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NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R. J. WOLF, PETITIONER,

vs.

BANCO NACIONAL DE MEXICO, S.A., RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner and Counsel

60 PP



QUESTION PRESENTED:

Are the deposit instruments of foreign banks, advertised and offered publicly in the United States as attractive investments, sold through the mails to United States citizens, and unregulated by United States banking laws, securities within the meaning of the Securities Act of 1933?



PARTIES TO THE PROCEEDING

In addition to R. J. Wolf and Banco Nacional de Mexico, S. A., the following appeared as amici curiae in the Ninth Circuit Court of Appeals:

Securities and Exchange Commission
Federal Deposit Insurance Corporation
Institute of Foreign Bankers

Mexican Banking and Financial Institutions
and Organismo de Coordinacion de la Banca Mexicana



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JURISDICTION

The date and time of entry of the judgment sought to be reviewed was August 10, 1984.

A timely petition for rehearing en banc was filed August 23, 1984; the date of the order denying rehearing was October 18, 1984.

The statute conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. §1254(1).



STATUTORY PROVISIONS

Securities Act of 1933, 15 U.S.C. §77b,
provides,

When used in this subchapter, unless
the context otherwise requires --

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.



15 U.S.C. §77e provides,

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly -

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. §771 provides,

Any person who -

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material



fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.



STATEMENT OF THE CASE

In 1981 Wolf read certain advertisements in California newspapers placed by Banco Nacional de Mexico, S.A. (Banamex) and offering "investment opportunities" in its "fixed term peso accounts". Wolf wrote Banamex asking for further information and received in reply a brochure describing the various "investment opportunities", and an application form should Wolf "decide to invest".

The brochure entitled "Mexico's Other Great Climate ... Investment" explains:

"The information contained in this brochure is designed to help you decide on the investment most suited to your needs. However, should you require any further details please ... write to: Securities Promotion, Isabel La Catolica 44, Mezzanine, Mexico 1, D.F., Mexico ...

You will find for your convenience an insertion at the back of this brochure containing a list of Time Deposit Investment opportunities



and details of current legal stipulations covering such investments. Reading the accompanying information will help you select the investments most suited to your needs ...

For persons residing outside of Mexico the following procedure applies: Provide Banamex in writing with the following: 1). Amount you wish to invest by type of investment. 2). Enclose bank draft, personal check or cashier's check covering amount of investment(s). Checks made out to the order of Banco Nacional de Mexico, S. A. (BANAMEX) preferably in U. S. dollars or Mexican pesos. Checks sent in U. S. dollars or other currencies for investments in Mexican pesos will be converted into Mexican pesos at the rate of exchange prevailing in the Mexican money market on the day your check is received. 3). Name or joint names in which the account is to be opened, and type of account. 4). Instructions on payments of interests ...

For further investments, simply send your instructions along with your account number and covering check ...

Mexico has no exchange controls which means your interest and principal can be remitted to you freely and without hindrance, in the currency of your choice. The Mexican peso, like the U. S. dollar, is a floating currency which means that the rate of exchange between the peso and the currency you request your interests and principal to be paid to you in could vary upwards or downwards between the time you purchase your Time Deposit and



maturity. However, since 1977 the Banco de Mexico, Mexico's Central Bank, has maintained a stable peso-dollar parity by intervening in the money market ... "

Thereafter Wolf mailed a total of \$60,000. to Banamex in Tijuana for investments in one six-month and two three-month accounts, to pay him net interest returns of 33.9%, 31.4% and 32.75% respectively, to be remitted monthly, by mail, in dollars. The investments were evidenced by uninsured, non-negotiable, non-withdrawable deposit receipts.

In February 1982 prior to the maturity of these investments, the Banco de Mexico ceased its intervention in the money market and the exchange value of the peso declined dramatically. Upon maturity Banamex redeemed the three investments for a total of \$35,536. -- \$24,464. less than their original value.



Wolf sued claiming Banamex had omitted material facts in its brochure misleading him in violation of Sections 12(2) and 17 (a) (2) of the Securities Act of 1933, 15 U.S.C. §§771(2) and 77q(a) (2); and that Banamex had sold him unregistered securities in violation of Section 12(1) of the Securities Act of 1933, 15 U.S.C. §771(1).

Specifically Wolf claimed the brochure should have included the following material facts of which he was unaware:

"(a) That the Mexican peso, in fact required continuing, active support by the Mexican Federal Reserve in order to maintain its parity with the United States dollar.

(b) That the Banco de Mexico would not necessarily continue to intervene in the Mexican money market in order to maintain a stable peso-dollar parity.

(c) That the Banco de Mexico was not obliged by custom or practice to maintain a stable peso-dollar parity by intervening in the Mexican money market or otherwise.

(d) That in the event the Banco de



Mexico ceased its intervention in the Mexican money market to support the peso that currency would decline in value dramatically as compared to the dollar.

(e) That any substantial decline in value of the peso to the dollar from the time of deposit until maturity would cause substantial loss of the deposit itself.

(f) That even a slight decline in value of the peso to the dollar from the time of deposit until maturity could eliminate entirely all net return on the deposit.

(g) That the rate of interest payable monthly would be based upon the then current rate of exchange between the peso and the dollar rather than the rate of exchange at the time of deposit.

(h) That the deposit would be re-converted into dollars at the rate of exchange prevailing on the date of maturity.

(i) That all monthly statements would be in Spanish, not English.

(j) That a time deposit in pesos was, in fact, highly speculative if not dangerous."

Had those facts been disclosed, Wolf would have made no investments in Banamex time deposits.



Wolf had no prior knowledge of the possible devaluation of the peso. Although Banamex claimed to have no actual knowledge the peso would be devalued, it produced in the district court previously published information to that effect, and the Chairman of its Board of Directors was a member of the Advisory Board of the Banco de Mexico at and prior to the time it decided to and did withdraw its support of the peso.

The district court never reached the claims of omission, misrepresentation and fraud. On cross-motions for summary judgment it held dispositive that these deposit instruments were securities, and that Banamex was strictly liable to Wolf for damages under Section 12(1) of the Securities Act of 1933, 15 U.S.C. §771(1), for having failed to register them (549 F. Supp. 841; appx. p. 25).



Banamex's first appeal was dismissed because the judgment entered was not final, 721 F.2d 660; appx. p. 74. On remand, the district court granted Banamex's motion to certify the securities question,

Defendant's motion to certify pursuant to 28 U.S.C. §1292(b) is granted. The issue whether the peso accounts are securities clearly involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of the litigation since reversal of this Court's order would end it. (appx. p. 82);

and the Court of Appeals granted permission to appeal, appx. p. 84.

First observing,

As the district court noted, no other court has resolved the question of whether a certificate of deposit issued by a foreign bank is a security within the federal securities acts,

appx. p. 9, the Court of Appeals reversed the district court and held that the deposit instruments were not securities, 739 F.2d 1458; appx. p. 1.



ARGUMENT

The Court of Appeals has decided whether the deposit instruments here are securities in a way that conflicts with applicable decisions of this Court.

Concededly eschewing all other tests for defining a security, that court said,

... when the Supreme Court, in Marine Bank v. Weaver [455 U.S. 551 (1982)], has so recently applied the definition [of a security] to facts very similar to those in the case before us, we are bound by its reasoning there, to the exclusion of criteria articulated in other contexts. (appx. pp. 10, 11).

But other than the fact both involve instruments issued by banks, there is no similarity between the instant case and Weaver; the reasoning of Weaver does not apply here; and the criteria articulated by this Court in Weaver and prior decisions demand that the deposit instruments at issue be held securities.



Weaver held that an ordinary certificate of deposit, issued by a federally regulated domestic bank, and insured against loss by the FDIC, was not a security for purposes of the antifraud provisions of the federal securities laws, specifically under Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10). Weaver explained,

This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation ... We see, therefore, important differences between a certificate of deposit purchased from a federally regulated bank and other long-term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency. ... It is unnecessary to subject

issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. 455 U. S. at 558.

Addressing the separate agreement between the Weavers and the Piccirillos, this Court reminded,

The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors, not a private transaction as in this case. In Howey, for example, 42 persons purchased interests in a citrus grove during a four-month period. 328 U. S., at 295. In C. M. Joiner Leasing, offers to sell oil leases were sent to over 1,000 prospects. 320 U. S. at 346 ... Here, in contrast, the Piccirillos distributed no prospectus to the Weavers or to other potential investors ... 455 U. S. at 559, 560.

Weaver concluded,

It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a security as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. 455 U. S. at 560, note 11.



Assuming that the mere existence of Mexican bank regulation was sufficient under Weaver to remove the instant transaction from the parameters of the federal securities laws, the Court of Appeals ignored Weaver's admonition that

[e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole. (note 11)

Thereby, the Court of Appeals failed to apprehend the critical distinctions between a domestic certificate of deposit and the instruments in question here: Unlike a domestic certificate of deposit, Wolf had neither dominion nor control over his deposit-investments, only receipts; they were non-negotiable; they could not be pledged, mortgaged, assigned, borrowed-against; and they were not withdrawable prior to maturity by acceptance of an interest penalty or otherwise. Thus, Wolf



was prevented from mitigating any losses he might sustain in the event of the continuing decline in the exchange value of his deposit-investment by the very same Mexican bank regulation the Court of Appeals found provided him

with protection equivalent to that afforded depositors in the federally regulated Marine bank.

739 F.2d at 1464; appx. p. 24.

Unlike a domestic certificate of deposit, Wolf's "deposits" were not insured against loss of any kind, not even against insolvency for Mexican bank regulation does not provide for deposit insurance. Therefore, unlike Weaver, Wolf did in fact assume the risk of Banamex's insolvency.

The Court of Appeals found Mexican bank regulation provided Wolf

the same degree of protection against insolvency as does the federal system in this country,



(739 F.2d at 1463; appx. pp. 22) because

Banamex ... is supervised ... must adhere to paid-in capital and reserve requirements, and its advertising is subject to ... approval ... It is required to publish monthly financial statements ... for approval ... [and is] audit[ed] ... annually. Although there was ... no deposit insurance program, no Mexican bank has failed in the past 50 years. In the event of such a failure ... certificates of deposit, by law would constitute preferential claims against all other obligations.

739 F.2d at 1463; appx. p. 23. Those observations were repeated almost verbatim from a conclusionary declaration by Banamex's agent-for-service-of-process, the only support in the record for them. At least one is contrary to law. Mexico's Law of Bankruptcy and Suspension of Payments Article 437 provides, "The plan of preference shall be subject to the following order:" 1) taxes; 2) creditors of the bankrupt estate; 3) liquidation expenses; 4) creditors with collateral; 5) fiscal assessments for taxes; 6) labor claims;



7) savings account creditors; 8) demand or time deposit account creditors; 9) bond creditors; 10) general creditors. Thus, in the event of a Mexican bank's failure, certificates of deposit would not "constitute preferential claims against all other obligations"; instead, they would be eighth in line.

Nor, even if it were true, is the prior lack of bank failure any protection against the risk of bank failure -- a risk Wolf in fact assumed when he made his investments.

[T]he nature of an instrument is to be determined at the time of its issuance, not at some subsequent time.

Great Western Bank & Trust v. Kotz, 532 F.2d 1252 (CA9 1976).

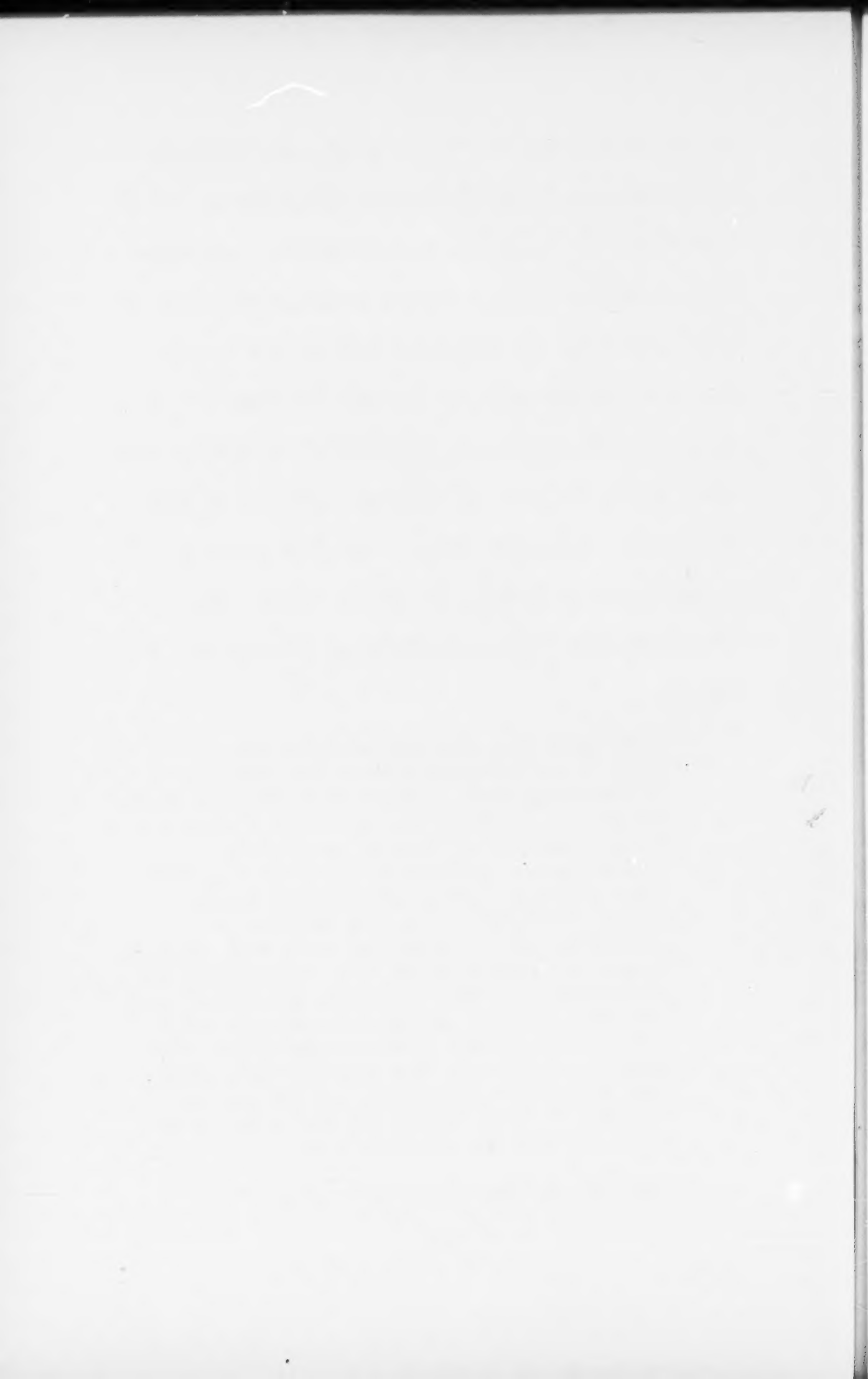
Reserve, reporting and inspection requirements appear in the banking laws of most, if not all nations; they are modeled after one another. Their mere existence, however,



is no guaranty of their past, or future, enforcement, nor of their efficacy. It is a matter of fact that during the relevant times here, a very considerable portion of the deposits in Banamex and other large Mexican banks was no longer in Mexico at all but was instead "invested" abroad, and that this flight of capital posing a very real and imminent threat to the safety of depositors and the value of their deposits, impelled the nationalization of Mexico's banks.

That the private investors to which have been concessioned the services of banking and credit in general have obtained increasing profits from the exploitation of these services, creating in addition in their interest, monopolistic phenomena with money derived from the public in general, which must be avoided in order to administer the resources so obtained for the general interest and for the social diversification of credit in order that it reaches the greater part of the productive public and does not continue to be concentrated in the hands of the most favored levels of society; ...

That with the objective that the



Mexican people, who had delivered with their money and assets to the banks for the administration and custody thereof, has created an economic structure which such banks now have, do not suffer any detriment and may continue to receive this important public service and with the purpose that their rights are not diminished even in the most minimal manner, the decision has been taken to expropriate for purposes of public use the assets of the private credit institutions ...

Decree Which Establishes The Nationalization of Private Banks, September 1, 1982. Even if the reserve, reporting, and inspection requirements are adequate, none can ever prevent insolvency (49 banks have failed this year in the United States alone), nor is a valid substitute for deposit insurance.

The district court, moreover, found Mexican bank regulation both irrelevant to, and insufficient as a defense in, this case.

Mexican bank deposits are not insured. Banamex urges that Mexican reserve, reporting and inspection requirements are as thorough as their American counterparts. Even if this is so, Weaver does not rest on the independent effect of such requirements on a



depositor's risk; and to the extent Weaver invokes those requirements, it appears to emphasize their federal character ... Weaver thus does not compel the conclusion that Mexican banking laws obviate the application of the securities acts in this case.

Furthermore, plaintiff assumed not only the risk of Banamex's insolvency but also the much more substantial risk of a currency devaluation...

In this case it is not contested that Mexico thoroughly regulates its banks and that no Mexican bank has become insolvent in fifty years. That is not enough, however, to make Wolf's investment virtually free of risk. Indeed, governmental regulation has no effect on the essential risk to which an investor in foreign time deposits is exposed -- the risk of devaluation. Because the rationale of Weaver is inapplicable here, the Court holds that plaintiff's time deposits were securities.

549 F. Supp. at 845, 853; appx. pp. 36, 58.

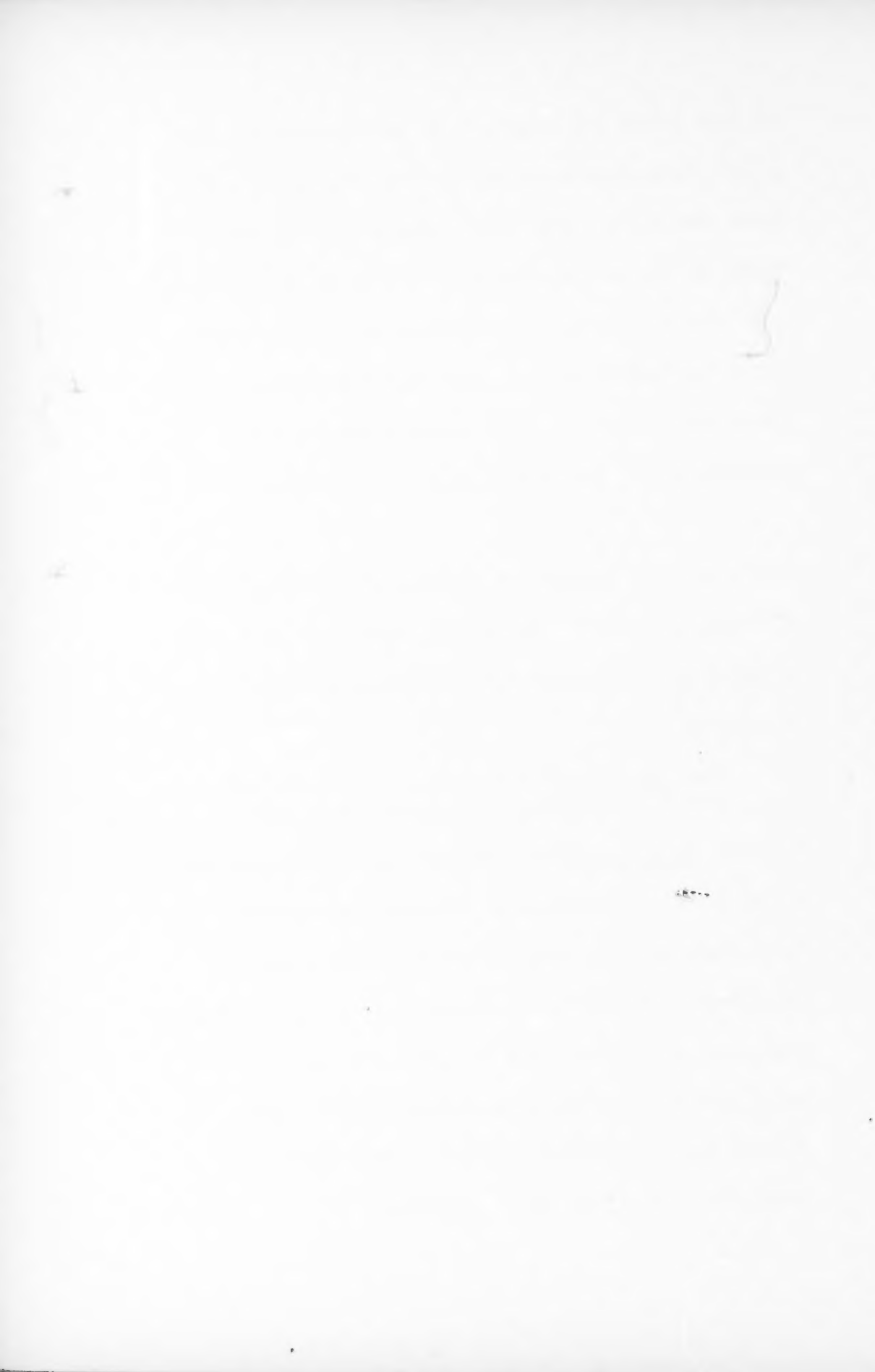
The Court of Appeals dismissed that reasoning by creating two mythical depositors it said would not have benefitted from federal bank regulation. But the court failed to address the right of early withdrawal permitting mitigation or elimination

of the risk of loss, the existence of deposit insurance eliminating the risk of bank failure, the fact there is no way federal bank regulation would have permitted the carnival promotion of these deposits to begin with, and the fact that any form of complete disclosure would have discouraged all such deposit-investments.

Contrary to Weaver's admonition, the Court of Appeals also failed to analyze and evaluate the instant transaction on the basis of

the purposes intended to be served,
and the factual setting as a whole.

Unlike Weaver, the instant transaction was part of an investment scheme, of international scope, designed and promoted by Banamex's Securities Department, the avowed purpose of which was to attract the investment of United States dollars into peso accounts. Undisputed are the district court's findings that Banamex



... advertised and promoted its accounts within the United States and dealt with plaintiff through the United States Postal Service ...

appx. p. 81; that

... [a]lthough the transaction took the form of a bank deposit, such deposits were promoted and widely solicited by Banamex as investments;

549 F.Supp. at 849; appx. p. 52; and that

defendant has presented no colorable argument to support its private offering defense -- a defense which on its face is completely without merit in light of Banamex's general advertising of peso accounts and its distribution of brochures designed to solicit interest in those accounts.

This Court has previously found critical, as it repeated in Weaver,

The unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors ...

455 U. S. at 559. In the factual setting here were millions of offerees and an internationally disseminated brochure replete with omission and misrepresentation. Weaver was totally dissimilar; neither its



holding nor rationale apply. It is, after all, completely inconsistent with Weaver to exempt the deposit instruments of a foreign bank unregulated by United States banking laws from the requirements of the federal securities laws.

This Court's prior decisions establish that any instrument, taking traditional forms or not, when offered publicly as an investment and not specifically exempted from the federal securities laws, is a security. See, e.g., SEC v. C. M. Joiner Leasing Corp., 320 U. S. 344 (1943); SEC v. W. J. Howey Co., 328 U. S. 293 (1946); Tcherepnin v. Knight, 389 U. S. 332 (1967).

A fair reading of the Court of Appeals' own prior decisions, although purporting to apply a "risk-capital" test, also confirms that any instrument offered publicly as an investment is a security. See, e.g.,

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SEC v. Glen W. Turner, Ent., Inc., 474 F.2d 476 (CA9 1973); El Khadem v. Equity Securities Corp., 494 F.2d 1224 (CA9 1974), cert. den., 419 U. S. 900; Safeway Portland v. C. H. Wagner & Co., Inc., 501 F.2d 1120 (CA9 1974); United States v. Carman, 577 F.2d 556 (CA9 1978); United States v. Far- ris, 614 F.2d 634 (CA9 1979), cert.den., 447 U. S. 926. See also, Great Western Bank & Trust Co. v. Kotz, *supra*; United California Bank v. THC Financial Corp., 557 F.2d 1351 (CA9 1977); Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (CA9 1978).

Except for its mistaken reliance upon Weaver, the Court of Appeals would have had to conclude that the deposit instruments at issue were indeed securities.



Both conflict and the potential for conflict exist between the Ninth Circuit and other Courts of Appeals on whether similar instruments are securities.

In Meason v. Bank of Miami, 652 F.2d 542 (CA5 1981), cert.den., 455 U. S. 939, the Fifth Circuit held that whether or not a foreign certificate of deposit was a security depended upon its investment character. There, plaintiffs purchased from a state bank (Bank of Miami) fixed term deposits in a sister bank (Popular) organized pursuant to the laws of the Grand Cayman Islands, British West Indies. Both banks were wholly owned subsidiaries of the same Florida holding company. Popular had insufficient funds with which to redeem the time deposits upon maturity. Meason said,

The Bellah [v. First National Bank, 495 F.2d 1109 (CA5 1974)] court applied the commercial-investment

dichotomy not only to notes but to certificates of deposit as well. Although the court found the investment characteristic lacking in the certificate of deposit at issue, it modified the dismissal of the suit to permit the plaintiffs to pursue the theory that the certificate of deposit was a security. 495 F.2d at 1114-16. See also Reid v. Hughes, 578 F.2d 634, 638 (5th Cir. 1978) (recognizing that "in certain situations a certificate of deposit can be a security as that term is used in the Act ...") ...

This is not an ordinary banking transaction in which "currency" was deposited. Rather, a state chartered bank was allowing the sale of "term deposits" in a foreign bank to be sold on its premises by one of its officers ... [W]e remand so that appellants may attempt to demonstrate the investment character of their certificates of deposit.

As noted, this Court denied certiorari in Meason the same term it decided Weaver, 1982. Banamex's sales of its deposit instruments was of course far more widespread; it never even pretended to be promoting ordinary banking transactions; its sales literature instead proclaimed its deposits were nothing more than attractive



investments. The Fifth Circuit would have little difficulty holding that the investment character of Banamex's deposit instruments establishes them as securities.

In SEC v. First American Bank & Trust Co., 481 F.2d 673 (CA8 1973), the Eighth Circuit first noted,

the deposits of First American are not insured by a governmental agency or private corporation;

then declared,

It is not disputed that First American did offer to sell or in fact did sell through the use of the facilities of interstate commerce, capital notes, certificates of investment and passbook savings accounts. It is equally clear that for purposes of the Securities Act, these items are "securities".

The Eighth Circuit would have no difficulty holding that Banamex's uninsured deposit instruments sold through the mails were securities.



The Court of Appeals has decided this important question of first impression under the Securities Act of 1933 in a manner that is totally inconsistent with the plain meaning and obvious purposes of the Act.

It is completely inconsistent with the Securities Act of 1933 to exempt the deposit instruments of a foreign bank from the registration provisions of that Act, when the Congress that enacted it specifically exempted securities issued or guaranteed by domestic banks, but not those of foreign banks. Reenacted without change as recently as 1982, 15 U.S.C.

§77c(a)(2) continues to provide,

the term "bank" means any national bank, or any banking institution organized under the laws of any State.

See Public Law 97-261, September 20, 1982.

As declared in Reufenacht v. O'Halloran,



727 F.2d 320 (CA3 1984),

When Congress wished to exempt a class of instruments from some or all of the [Securities] Acts' provisions, it had little trouble in doing so expressly.

In Securities Industry Association v.

Board of Governors of the Federal Reserve

System, 52 L.W. 4943 (June 28, 1984), this

Court held,

Because commercial paper falls within the plain language of the Act, and because the inclusion of commercial paper within the terms of the Act is fully consistent with the Act's purposes, we conclude that commercial paper is a "security" under the Glass-Steagall Act ...,

stating,

There is, moreover considerable evidence to indicate that the ordinary meaning of the terms "security" and "note" as used by the 1933 Congress encompasses commercial paper ... In each of these other statutes, the definition of the term "security" includes commercial paper, and each statute contains explicit exceptions when Congress meant for the provisions of an act not to apply ... The Securities Act of 1933, for example, defines the term "security" to include "any note."

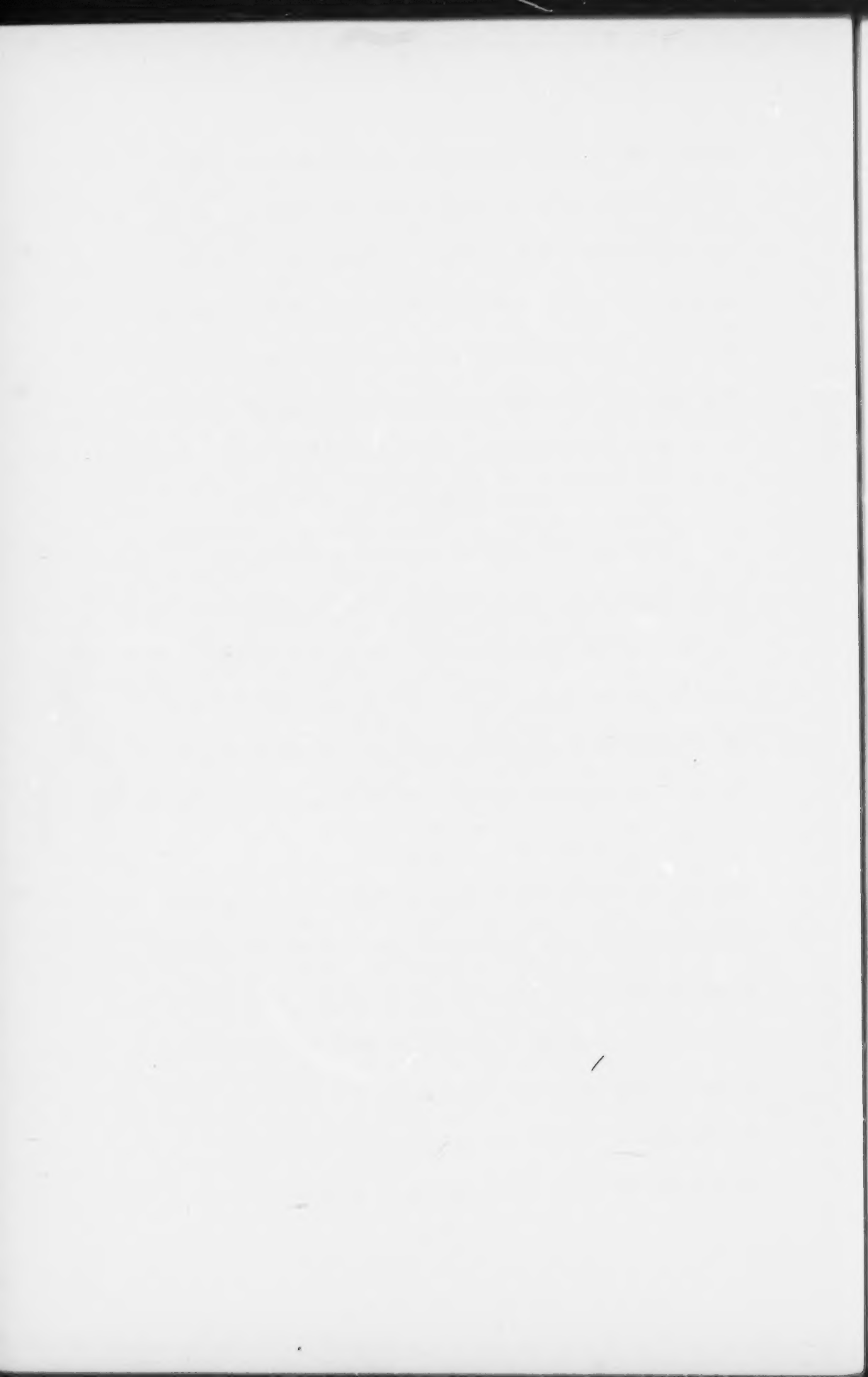


Here, too, the deposit instruments fall within the plain language of the 1933 Act as "evidence of indebtedness" or "receipt" therefor, 15 U.S.C. §77b(1); their inclusion is fully consistent with the purposes for which the securities laws were enacted,

the protection of investors, for the safeguarding of values, and so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation;

Sen. Rep. No. 792, 73rd Cong., 2d Sess. 2 (1934); and nowhere is there an exemption, explicit or implicit, for the securities, or evidences of indebtedness, of a foreign bank. Instead, quite the opposite is true.

Not only has the distinction between the instruments of domestic and foreign banks always existed in the 1933 Act, and not only has it been insufficient under the plain language of that Act to exempt an instrument from registration upon the grounds it was issued by a foreign bank,



albeit well-regulated, the registration provisions have always applied even to the issues of securities by foreign governments; see, 15 U.S.C. §77f(a), §77j(a)(2); see also, SEC v. Chinese Benevolent Assn., 120 F.2d 738 (CA2 1941) (Hand, J.),

the provisions for registration statements apply to issues of securities by a foreign government [cit. om.].

Suddenly to exempt the instruments of a foreign bank that is wholly owned by a foreign government as Banamex is here, would be a logical absurdity.

Nor can the pretended safety allegedly provided by foreign regulation ever be a valid substitute for the domestic regulation and everyday supervision of a bank and its instruments pursuant to laws and by agencies created by Congress, that Weaver said made application of the securities laws there superfluous. As this Court noted in Securities Industry Ass'n.



v. Board of Governors of the Federal Reserve System, supra,

We do not doubt that the risk of default with commercial paper is relatively low - lower perhaps than with many bank loans ... however, we find reliance on this characteristic misplaced ... there is little evidence to suggest that Congress intended the Act's prohibitions on underwriting to depend on the safety of particular securities ... the Act just prohibits commercial banks from underwriting any of them, with an exception for certain enumerated governmental obligations that Congress specifically has chosen to favor.

So too here; Congress has specifically chosen to favor domestic banks because Congress regulates them in other ways.

It is completely inconsistent with the recent amendments to the definitional sections of the federal securities laws to exempt from their application the deposit instruments at issue here. Interestingly, the Court of Appeals sought guidance there, but found none:

We see little in the amendments or



their legislative history to guide us in determining the outcome in the context before us.

739 F.2d 1462; appx. p. 21. Overlooked, or ignored, was that particular portion of those amendments that most nearly describes the instruments at issue here, and the legislative history pertinent thereto.

First finding that

Financial instruments designed to speculate on, or hedge against, fluctuations in interest rates and exchange rates, as well as stock market movements and other economic changes have proliferated,

1982 U. S. Code Cong. & Adm. News, page 2781 (emphasis added), Congress added to the definitions of a security,

any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency.

15 U.S.C. §77b(1). Called a fixed-term peso account, what Banamex sold and Wolf /bought for United States dollars were merely options on Mexican pesos: The privilege of selling a fixed number of



Mexican pesos at the rate of exchange that would prevail on a specific future date -- the dates each of the so-called "accounts" matured. Because he could neither use nor spend the pesos prior to maturity, Wolf became an unwitting speculator in the peso futures market without receiving any of the benefits of disclosure to which he was entitled under the federal securities laws. See, e.g., 17 C.F.R. §229.20, Item 11, Instruction 10; appx. p. 73,

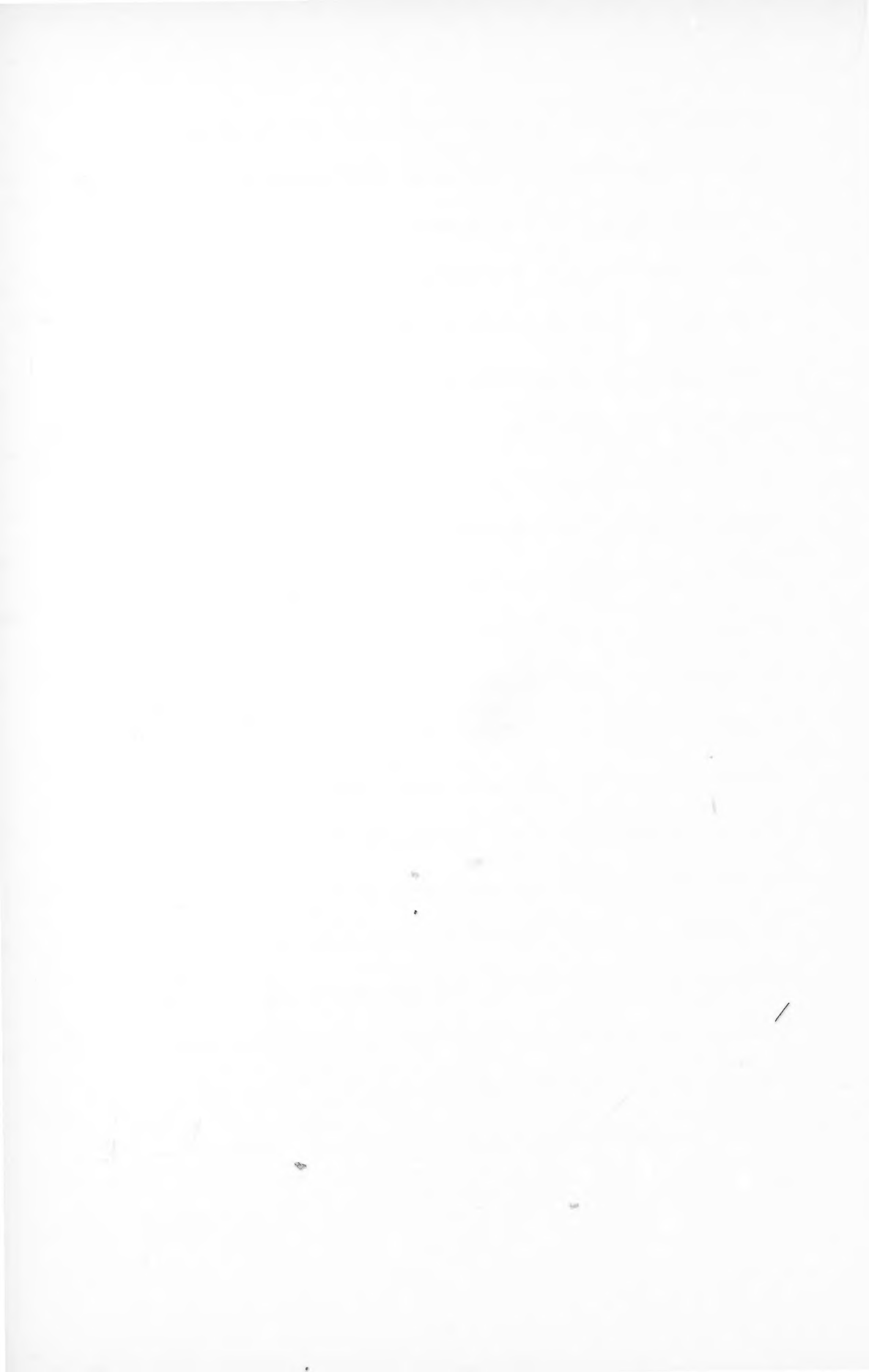
Foreign private registrants [which Banamex was at the times of sale and redemption here] should also discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors which have materially affected or could materially affect, directly or indirectly, company operations or investments by United States nationals.

These fixed-term peso accounts were nothing more and nothing less than "financial instruments designed to speculate on ... exchange rates". As such, they were precisely the kind of instrument subject to the registration as well as the antifraud



provisions of the securities acts, over which the Securities and Exchange Commission has always exercised jurisdiction, which exclusive jurisdiction the recent amendments were merely designed to confirm. See, 1982 U. S. Code Cong. & Adm. News, pages 2780 - 2789.

When Banamex's international advertising and promotional solicitations are considered, in particular its representations of governmental support for the peso when there can be no doubt it knew that support would cease at any moment (its Chairman was a member of the Advisory Board of the Banco de Mexico at and prior to the time it withdrew its support; Banamex produced previously published information of imminent devaluation at the summary judgment hearings in the district court), the deposit instruments here absolutely demand securities law regulation.

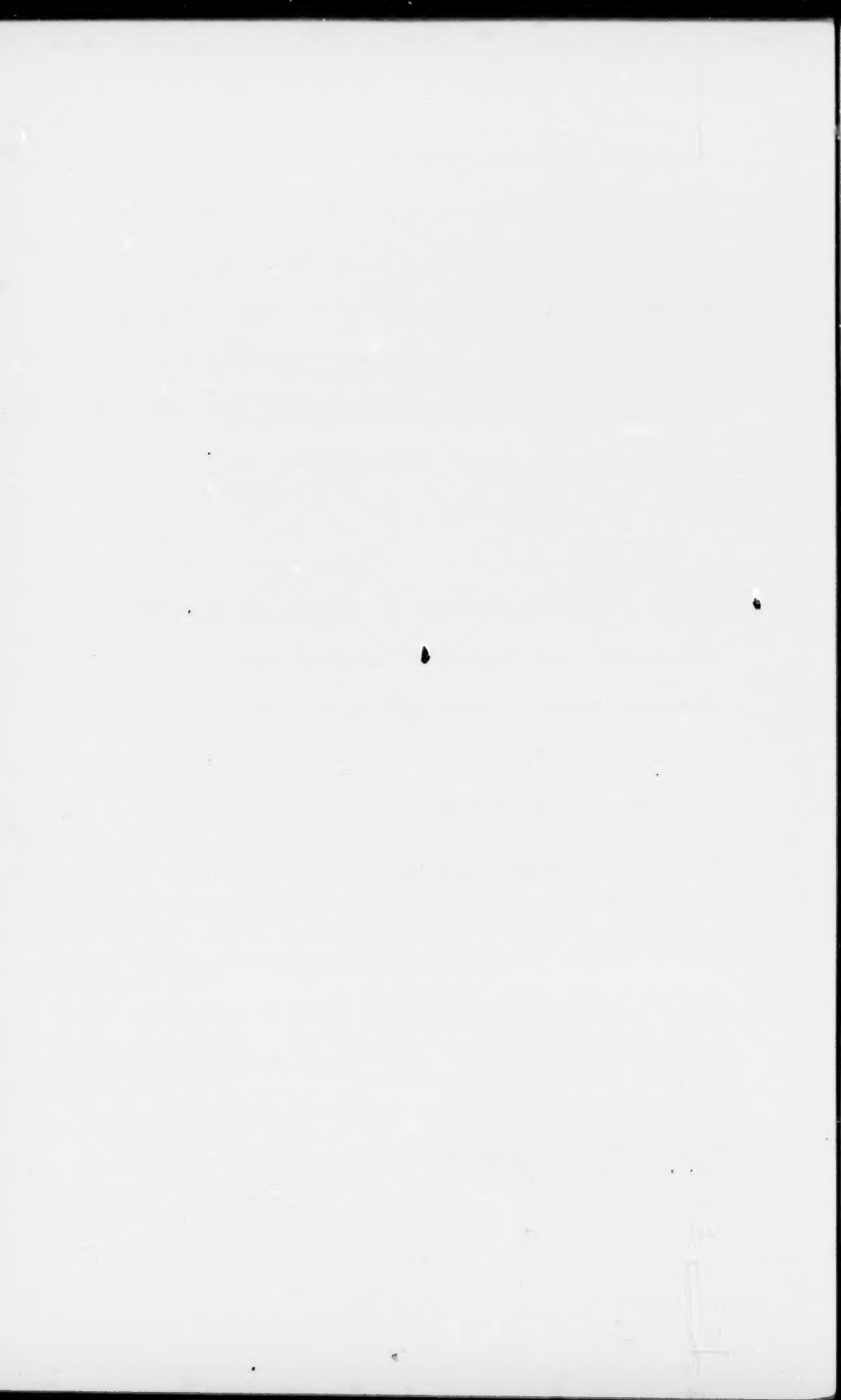


The Court of Appeals has decided whether the deposit instruments here are securities under the Securities Act of 1933, in a manner directly contrary to the well established construction given that Act by the Securities and Exchange Commission.

As early as 1976, it was the unqualified position of the Securities and Exchange Commission that Mexican bank certificates of deposit, when offered or sold to United States citizens by means of solicitations in publications or sales literature distributed through the mails (as is undisputed here), were securities required to be registered under Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1), and that no exemption from registration was available with respect to such securities. Securities Act Release No. 5379, September 7, 1976; 10 SEC Docket 406. At that time, the Commission had reached an

apparent accord with the Mexican Government that would prohibit such activities by Mexican banks thereafter (see Release); obviously, it was ineffectual, and breached. See also, SEC v. Mexletter-Mexican Business & Investment Service, Civ. Act. No. 76-1660 (D.C.), Litigation Release No. 8021, July 8, 1977, 12 SEC Docket 1150.

It is also the Commission's unqualified position that certificates of deposit and similar instruments issued by banking organizations not subject to federal bank regulation are securities. See, e.g., SEC v. Maxwell E. Meek, Civ. Act. No. 81-227-T (W.D.Okla.), Litigation Release No. 9307, March 3, 1981, 22 SEC Docket 388; SEC v. Liberty Loan Corp., Civ. Act. No. 76-304c (E.D.Mo.), Litigation Release No. 7356, April 13, 1976, 9 SEC Docket 446; SEC v. First American Bank & Trust Co., 481 F.2d 673 (CA8, 1973).



As the single agency entrusted by Congress to administer the federal securities laws, the Securities and Exchange Commission appeared as an amicus curiae in the Court of Appeals and advised it:

... the term "security" should not be construed to deny U. S. residents the protections of the securities laws in situations where time deposits that are unregulated by U. S. bank regulatory agencies are offered to the general public as investments.

... permitting foreign banks to sell their deposit instruments in this country without being subject to federal banking or securities regulation would be wholly inconsistent with Weaver.

If the instruments are offered or sold to the general public on the representation that they are an attractive investment, they would be securities.

Brief of the Securities and Exchange Commission, Amicus Curiae, pp. 1, 11, 16, 17.

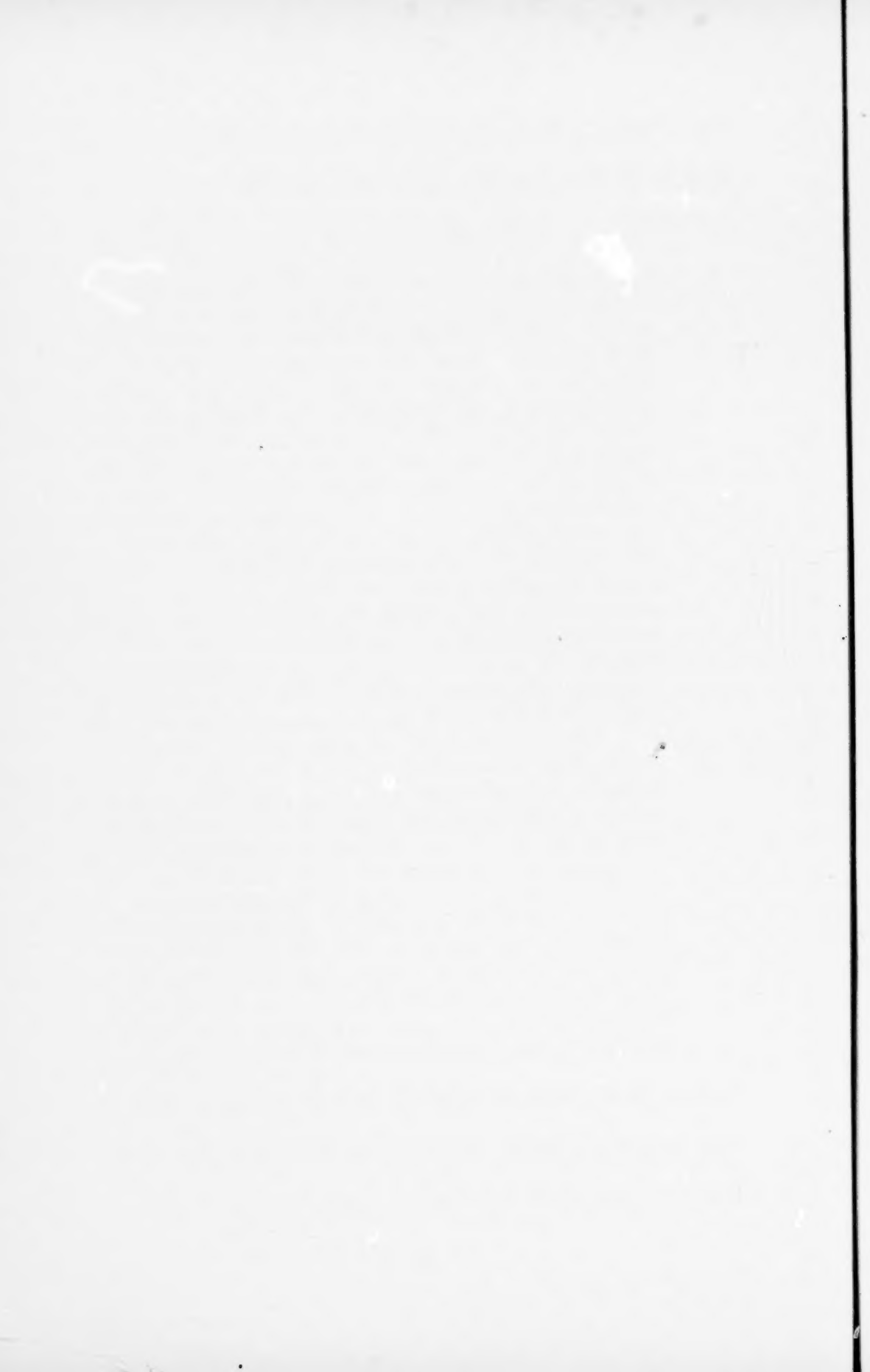
By ignoring, entirely, the Securities and Exchange Commission, the Court of Appeals failed to adhere to well-settled principles of law -- principles repeated most recently



in Chevron U.S. A. Inc. v. Natural Resources
Defense Council, ___ U. S. ___; 52 L.W. 4845,
at 4847,

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." [cit.om.] ... We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [cits.om.] "... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." [cits.om.]

Here, both the formulation of policy and the construction given the statute by the Securities and Exchange Commission with

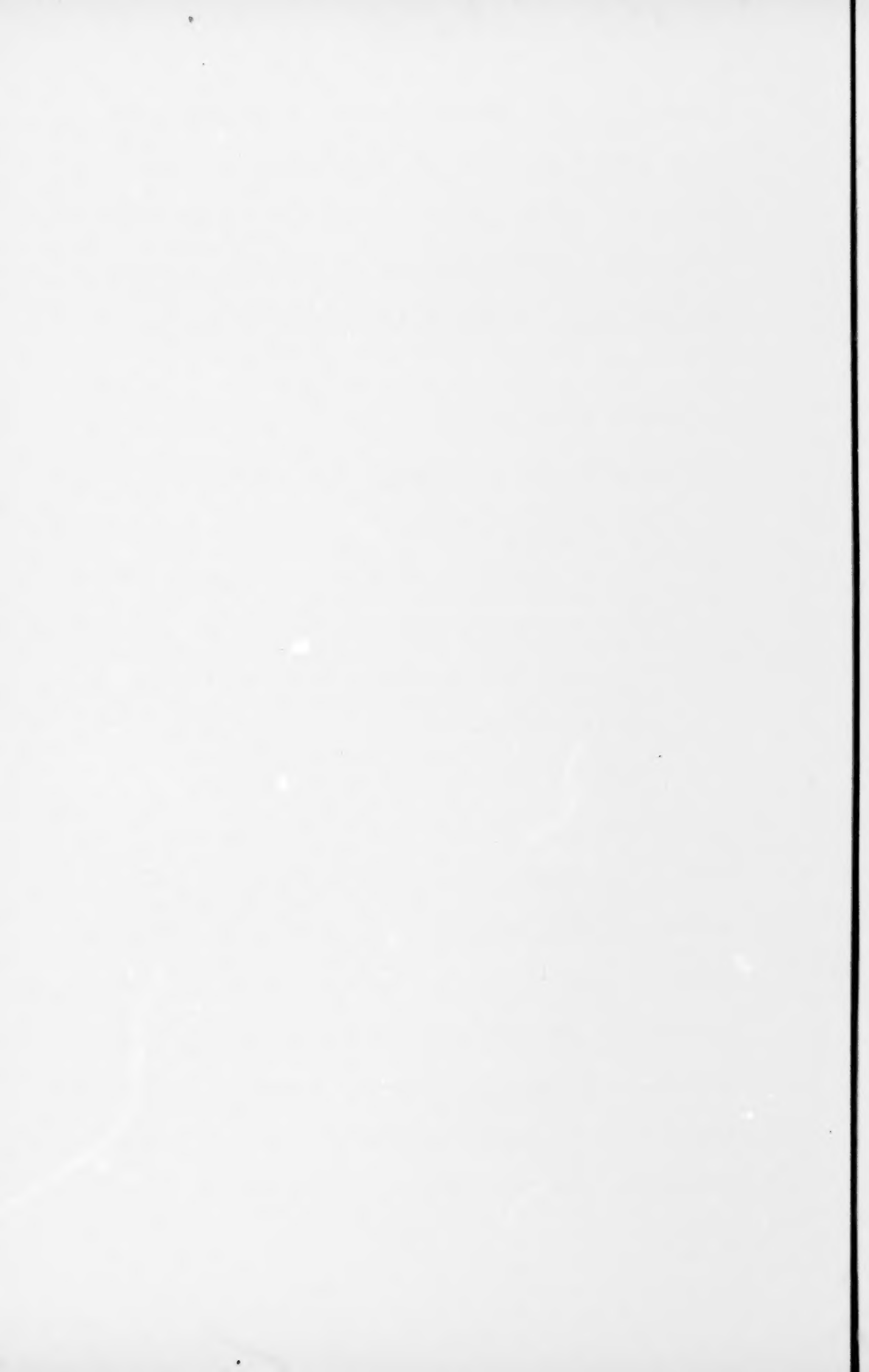


regard to the necessity for the registration as securities of the deposit instruments at issue, are completely consistent with the plain language of the Securities Act of 1933, and its legislative history.

As Judge Hand noted in SEC v. Chinese Benevolent Ass'n, supra, the Commission's

... effort is only to prevent the sale of Chinese securities through the mails without registry. If that can not be prevented, there is nothing to stop Germany, Italy, Japan, or any other nation, as well as China, from flooding our markets with securities without affording purchasers the information which the Securities Act intends to render available for investors in foreign bond issues.

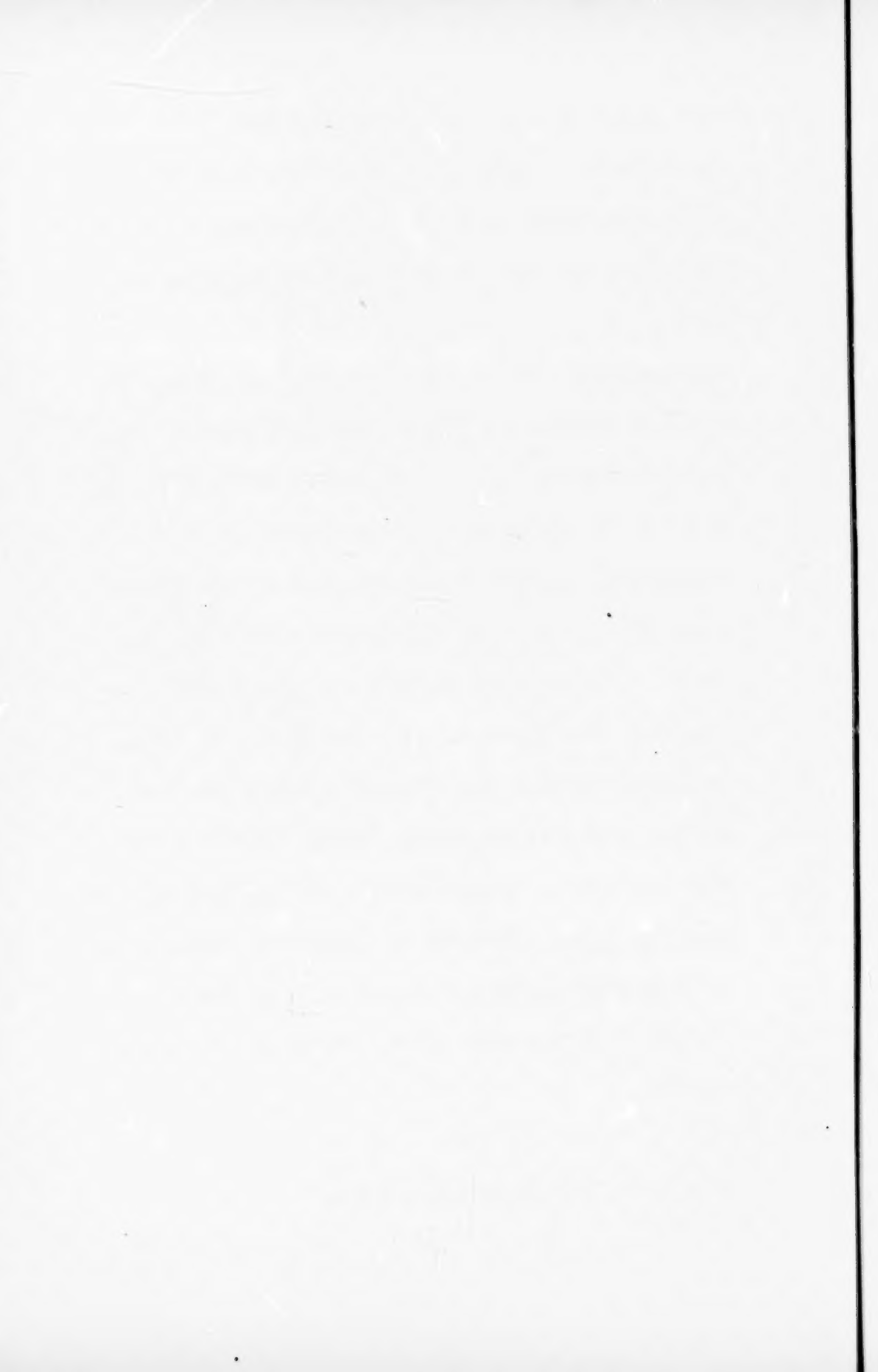
Indentically, if the sale of investments in Mexican deposit instruments through the mails without registry cannot be prevented, nothing will stop the sale of similar instruments by every other bank in this hemisphere and beyond; indeed, the opinion of the Court of Appeals will encourage such activity and insulate it from SEC scrutiny.



The Court of Appeals has decided this important question of first impression in a way that also is inconsistent with and contrary to the International Banking Act.

The International Banking Act of 1978, 12 U.S.C. §3102, et seq., governs foreign bank participation in the domestic market by providing for the establishment here of regulated branches of foreign banks desirous of conducting legitimate banking business with United States citizens and residents. In particular, the Act requires that such banks must comply with the reserve, reporting, inspection, advertising, and all other requirements of United States banking laws (§3102(b)), subject themselves to domestic banking rules of insolvency (§3102(j)(1)), and offer deposit insurance (§3104).

12 U.S.C. §3102(b) provides,



... Except as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location...

12 U.S.C. §3102(j)(1) provides,

... or whenever the Comptroller shall become satisfied that such foreign bank is insolvent, he may ... appoint a receiver who shall take possession of all the property and assets of such foreign bank in the United States and exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of national banks ...

12 U.S.C. §3104(a) provides,

No foreign bank may establish or operate a Federal branch which receives deposits of less than \$100,000 unless the branch is an insured branch ...

Obviously, were the reserve, reporting, inspection and other requirements imposed upon foreign banks in their countries of origin deemed adequate by Congress for the



protection of United States' depositors, there would have been no need for this legislation; or, Congress could have provided an exemption for "well-regulated" foreign banks. Since it did not, the courts must not. Given the deliberate evasion of the International Banking Act by Banamex, Congress would indeed sanction the treatment of these deposit instruments as securities, because that is the only means of insuring that the buyers of such instruments are adequately informed.

To permit Banamex to sell its deposit instruments here without submitting to domestic regulation, as the International Banking Act requires, provides Banamex with a competitive advantage over domestic banks -- an advantage that Act was designed to curtail.

The growth in number and size of foreign banking operations, and their ever-increasing importance to the



structure of the banking system and to the functioning of money and credit markets has created the need for both Federal monetary policy controls and for a Federal presence in the regulation and supervision of their activities in the United States ...

[F]oreign banks enjoy many competitive advantages over our domestic banks. This bill establishes the principle of parity of treatment between foreign and domestic banks in like circumstances ...

That U. S. banks are not in all cases afforded national treatment abroad presents a compelling reason not to grant foreign banks additional competitive advantages over domestic banks in the United States as well.

1978 U. S. Code Cong. & Adm. News, pages 1422, 1429.

Permitting Banamex to avoid federal securities regulation while it successfully evades federal banking regulation is doubly repugnant to the will of Congress, must not be permitted to continue, and obviously demands a national solution that the securities laws are specifically designed to provide.



The decision of the Court of Appeals will require lower federal courts to violate the act of state doctrine.

Although the offer and sale of the deposit instruments here were properly held to be commercial activities and therefore within the exceptions to both sovereign immunity and the act of state doctrine (appx. pp. 6-8; 80, 81), the decision of the Court of Appeals will require lower federal courts to conduct inquiries into the existence, enforcement and efficacy of the banking laws of sovereign foreign nations. It holds,

... [W]here a foreign government's regulatory structure is implicated, the trial court must hear evidence on the degree of protection that structure offers a depositor against insolvency ... [T]he bank shall bear the burden of proving such regulation, as an affirmative defense to a securities law charge. If the adequacy of the regulatory structure is proved, a certificate of deposit issued in a customary banking transaction is not, under Weaver, a security.



739 F.2d 1463; appx. p. 22. Any such inquiry, no matter its outcome, would be an intolerable intrusion by the judiciary into the internal affairs of a foreign nation expressly forbidden by the act of state doctrine. Vital still is the pronouncement of Underhill v. Hernandez, 168 U. S. 250 (1897),

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Reemphasized in Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398 (1964), none of this Court's more recent limitations on the doctrine, e.g., First National City Bank v. Banco Nacional de Cuba, 406 U. S. 759 (1972); Alfred Dunhill of London, Inc. v. Cuba, 425 U. S. 682 (1976), would preclude its application to foreclose absolutely any court adjudications of the



"adequacy" of a "foreign government's regulatory structure" which the Court of Appeals' decision would otherwise require.

As First National City Bank, supra, stated,

The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridicial review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.

And Alfred Dunhill, supra, repeated,

The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

It is quite impossible to imagine more of an embarrassment to the conduct of foreign relations by this government with another whose regulatory structure's adequacy was at the same time being litigated in some federal district court. If other reasons, already expressed, were not so compelling, this alone would necessitate certiorari.



The Court of Appeals has decided an important, novel, federal question that has not been, but should be, settled by this Court.

Whether or not the deposit instruments at issue in this proceeding are finally held to be securities will determine as well the claims of many, many thousands of depositors throughout the country, pending in lower federal courts, and involving hundreds of millions of dollars.

In addition to individual actions in other circuits, three putative class actions, all stayed during the pendency of the instant proceeding, are pending in the United States District Court for the Northern District of California: Davies, et al. v. Banco Nacional de Mexico, S.A., #C 82 6978 WWS; Thompson, et al. v. Bancomer, S.A., #C 83 0155 WWS; and West, et al. v. Multi-banco Comermex, S.A., #C 83 0174 WWS.

These three cases, although not yet certified as class actions, were brought on behalf of,

... all citizens and residents of the United States, all corporations incorporated within or under the laws of the United States, and all other entities having places of business within the United States, who purchased, renewed, owned or held a time deposit in the defendant bank within the period of any applicable statute of limitations (or who now or hereafter may purchase, renew, own or hold such account), to whom the defendant bank offered, sold, renewed, or otherwise dealt in or with such account by the use of any means or instruments of transportation or communication in interstate or foreign commerce or the mails.

The class actions present claims involving both investments in fixed term peso accounts and fixed term dollar accounts -- the latter alleging that these Mexican banks refused to repay the dollars when due, converted them to pesos at an artificial exchange rate substantially below the prevailing rate, thereby confiscating a major portion of those deposits. The opinion of the Court of



Appeals that the deposit instruments of a seemingly "well regulated" foreign bank will not constitute securities, could arguably apply to instruments evidencing investments in dollar accounts as well although it is utterly clear no reserve, reporting, nor inspection requirements will ever afford any protection whatsoever against confiscation.

CONCLUSION

For all of the reasons expressed, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

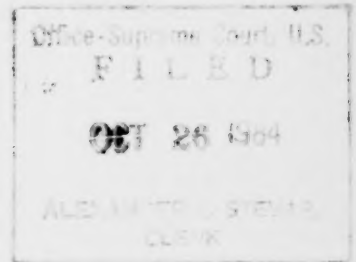
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84-678

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NO.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R. J. WOLF, PETITIONER,

vs.

BANCO NACIONAL DE MEXICO, S.A., RESPONDENT.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. J. WOLF, Plaintiff-Appellee,

vs.

BANCO NACIONAL de MEXICO, S.A.,
aka BANAMEX, Defendant-Appellant.

No. 84-1693

OPINION

August 10, 1984

Before: DUNIWAY, WALLACE and PREGERSON,
Circuit Judges

DUNIWAY, Circuit Judge:

The main issue in this appeal is whether a certificate of deposit for pesos, issued through interstate commerce to a United States resident by a Mexican bank, is a "security" for purposes of the federal securities laws. The holder of the cer-

tificate sued the bank after a devaluation of the Mexican currency shrank the dollar value of his investment. The district court found that the certificate was a security within the Securities Act of 1933 and, because the certificate was not registered, granted summary judgment against the bank. We reverse.

I. Facts.

Plaintiff R. J. Wolf read advertisements in California newspapers for certificates of deposit, in pesos, offered by Banco Nacional de Mexico (Banamex), a publicly held Mexican bank. Wolf wrote for more information, and the bank sent him through United States mail a brochure, which discussed a "bright future ... forecast for Mexico and for investors in general." The brochure explained that "persons residing outside of Mexico," such as Wolf, could open a time deposit account by providing



Banamex in writing with the following:

1). Amount you wish to invest by type of investment.

2). Enclose bank draft, personal check or cashier's check covering amount of investment(s). Checks made out to the order of Banco Nacional de Mexico, S.A. (BANAMEX) preferably in U.S. dollars or Mexican pesos.

Checks sent in U.S. dollars or other currencies for investments in Mexican pesos will be converted into Mexican pesos at the rate of exchange prevailing in the Mexican money market on the day your check is received.

Under the heading "Exchange rates and controls," the brochure stated,

Mexico has no exchange controls which means your interest and principal can be remitted to you freely and without hindrance, in the currency of your choice. The Mexican peso, like the U.S. dollar, is a floating currency which means that the rate of exchange between the peso and the currency you request your interests [sic] and principal to be paid to you in could vary upwards or downwards between the time you purchase your Time Deposit and maturity. However, since 1977 the Banco de Mexico, Mexico's Central Bank, has maintained a stable peso-dollar parity by intervening in the money market.

In 1981, Wolf invested a total of \$60,000



in one 6-month and two 3-month peso certificates of deposit of the bank, which he purchased with personal checks drawn on domestic banks in dollars, and mailed by him to the Banamex branch in Tijuana, Mexico. The certificates guaranteed him returns of 33.9 percent, 31.4 percent, and 32.75 percent interest, respectively. The accounts were uninsured, non-negotiable, and not withdrawable. As part of the deposit agreement, Banamex paid Wolf monthly interest, in pesos, which it converted to dollars.

Before the accounts matured, Mexico's central bank, roughly equivalent to the United States Federal Reserve Bank, abruptly ceased intervening in the money market to support the value of the peso. The peso quickly lost value. As a result, at the end of the certificates' terms, Banamex paid Wolf the number of pesos to



which the certificates entitled him, but they were converted into substantially fewer dollars. He received on \$35,536 of his original \$60,000 investment.

Wolf sued in federal court, alleging that Banamex sold him unregistered securities in violation of the Securities Act of 1933, 15 U.S.C. §771(1), and misled him in violation of the Act, §77q(a)(2). He also alleged common law fraud and violation of California securities laws.

The district court granted summary judgment in favor of Wolf under the Securities Act, finding Banamex strictly liable for selling unregistered securities under 15 U.S.C. §771(1). 549 F. Supp. 841. We dismissed Banamex's appeal from that order because the judgment entered was not final under 28 U.S.C. §1291. 721 F.2d 660. On remand, the district court granted

Banamex's motion to certify the order for interlocutory appeal under 28 U.S.C. §1292(b), and entered appropriate findings. We now reach the merits.

II. Sovereign Immunity.

Banamex claims immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq. That statute would not have protected Banamex, as a publicly held bank, in the early stages of this suit, but on September 1, 1982, the government of Mexico nationalized the bank. The court could have declined to consider Banamex's claim of immunity on the ground that the bank waived the defense by not raising it promptly below, as required by 28 U.S.C. §1605(a)(1).

The trial court heard the motions for summary judgment on September 3, 1982, two days after the bank was nationalized.

EDITOR'S NOTE

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Although Banamex's counsel apparently referred in passing to the nationalization, he did not discuss sovereign immunity at that hearing. Neither did Banamex raise the issue in its supplemental memorandum in support of summary judgment, filed September 9, nor in its motion for reconsideration or new trial of November 5, 1982. It finally raised the issue for the first time in its motion to stay proceedings to enforce the judgment, filed January 14, 1983. The court could have held that by bypassing the issue in the summary judgment proceedings Banamex had forgone the opportunity to raise the issue. 28 U.S.C. §1605(a)(1); Rothman v. Hospital Service of Southern California, 9 Cir., 1975, 510 F.2d 956, 960.

On remand, the district court did consider the issue. It denied Banamex's motion to stay, on the ground that the commercial



activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(2) applies. See Verlinden B.V. v. Central Bank of Nigeria, 1983, __U.S.__ (slip op. May 23, 1983); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 1 Cir., 1981, 647 F.2d 300. Cf. MOL, Inc. v. Peoples Republic of Bangladesh, 9 Cir., 1984, __F.2d__, __ (slip op. page 2861 at 2863). In our case, the sale of the certificate of deposit by Banamex to Wolf was clearly "a commercial activity carried on in the United States" by Banamex, within the meaning of §1605(a)(2). The district court was right.

III Definition of "Security."

A. The Weaver case.

Section 77b of Title 15, as amended in 1982, defines "security" for the purposes of the Securities Act of 1933. It states:

When used in this subchapter, unless

the context otherwise requires --

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddly, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

As the district court noted, no other court has resolved the question of whether a certificate of deposit issued by a foreign bank is a security within the federal securities acts. But the Supreme Court held in Marine Bank v. Weaver, 1982, 455



U.S. 551, that a similar certificate of deposit issued by a domestic bank was not a security for purposes of the Securities Exchange Act of 1934. The parties cite to us numerous "tests" used by this Court and others to define a "security" in other cases, e.g., the "economic realities" test, Securities & Exchange Commission v. W. J. Howey Co., 1946, 328 U.S. 293, and United Housing Foundation, Inc. v. Forman, 1975, 421 U.S. 837; the "risk capital" test, Great Western Bank & Trust v. Kotz, 9 Cir., 1976, 532 F.2d 1252, see Landreth Timber Co. v. Landreth, 9 Cir., 1984, 731 F.2d 1348, 1352; and the "commercial/investment" test, Bellah v. First National Bank of Hereford, 5 Cir., 1974, 495 F.2d 1109.

However, when the Supreme Court, in Marine Bank v. Weaver, has so recently applied the definition to facts very similar to those

in the case before us, we are bound by its reasoning there, to the exclusion of criteria articulated in other contexts. Cf. Meason v. Bank of Miami, 5 Cir., 1981, 652 F.2d 542 (pre-Weaver, reversing trial court's dismissal of securities claim in sale of a foreign bank's certificate of deposit and directing consideration of commercial/investment test on remand); Canadian Imperial Bank of Commerce Trust Co. v. Fingland, 7 Cir., 1980, 615 F.2d 465 (pre-Weaver, affirming dismissal of securities fraud charged in sale of foreign bank certificate of deposit).

Before proceeding, we note that the Weaver Court analyzed the status of a bank certificate of deposit as a security under the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10). That does not reduce Weaver's applicability because "the definition of 'security' in the 1934 Act is

essentially the same as the definition of 'security' in §2(1) of the Securities Act of 1933. 15 U.S.C. §77(b)(1)." Weaver, 455 U.S. at 555, n.3.

Plaintiffs in Weaver held a \$50,000, six-year certificate of deposit issued by a federally regulated Pennsylvania bank. The certificate paid 7½% interest, although the bank could charge an interest penalty upon early withdrawal of the principal. The holders had pledged the certificate as security for a bank loan to a packing company. After the packing company failed and the bank prepared to claim the certificate of deposit, the holders sued, alleging, inter alia, that the bank had violated the anti-fraud provisions of the 1934 Act, 15 U.S.C. §78j(b).

On appeal from the Third Circuit, the Court held that the certificate of deposit



was not a security. It said that there was an "important difference" between the certificate and other long-term debt obligations that might be securities:

This certificate of deposit was issued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry. Deposits in federally regulated banks are protected by the reserve, reporting, and inspection requirements of the federal banking laws; advertising relating to the interest paid on deposits is also regulated. In addition, deposits are insured by the Federal Deposit Insurance Corporation. Since its formation in 1933, nearly all depositors in failing banks insured by the FDIC have received payment in full, even payment for the portions of their deposits above the amount insured.

455 U.S. at 558, footnotes and citation omitted.

The Court observed that while the holder of an ordinary long-term debt "assumes the risk of the borrower's insolvency," government banking regulations "virtually guaranteed" that the holder of a Marine



Bank certificate of deposit would be repaid in full. Ibid. It concluded,

The definition of "security" in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.

Id. at 558-559. The Court added, however, "It does not follow that a certificate of deposit ... invariably falls outside the definition of a 'security' as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole."
Id. at 560, n.11.

In its analysis of Weaver, the district



court thought it crucial that Marine Bank was regulated by the United States government, and held that because federal banking laws do not regulate Banamex, Weaver did not control. We do not read Weaver so narrowly. The Court referred there to "federally regulated bank" and "federal banking laws" because the case arose in that context. We think that the Court found it significant that the issuing bank was regulated, and regulated adequately, not that it was the federal government that regulated it. Therefore, it was because repayment in full was "virtually guaranteed" and the certificate holders were "abundantly protected" that the certificates of deposit were outside the definition of "security" and the protection of the federal securities acts.

It was conceded below that "Mexico thoroughly regulates its banks and that no



Mexican bank has become insolvent in fifty years." 549 F. Supp. at 853. The district judge thought that irrelevant, however, because "plaintiff assumed ... the much more substantial risk of a currency devaluation." Id. at 845. Because a currency devaluation might prevent repayment of Wolf's principal from being "virtually guaranteed," the district court held the reasoning of Weaver inapplicable. We disagree. As the district court recognized, id. at 853, even the federal banking regulations present in Weaver would not have protected a depositor there against devaluation risk. If Wolf had purchased \$60,000 worth of Mexican pesos from a United States bank and used them to buy a peso certificate of deposit from that bank, he would have suffered precisely the same loss that he is complaining about in this case. A resident of Germany who, in 1970, used deutsche marks to purchase through the mail a certificate of

deposit of dollars from Marine Bank would have suffered the same type of loss, when the bank repaid him after the devaluations of the dollar in 1971 and 1973, as Wolf alleges here. The federal regulations and deposit insurance that were so important to the Court in Weaver would not in any way have protected this hypothetical depositor from losses caused by the devaluation. Whether a bank's certificate of deposit is a security surely cannot turn on the currency with which it is purchased or in which it is payable. The devaluation risk present whenever a certificate of deposit is purchased with or payable in a foreign currency therefore does not distinguish the certificates that Wolf bought from that which the Weavers bought.

B. The 1982 amendments.

The parties direct our attention to certain amendments to the 1933 and 1934 sec-



urities acts, enacted after Weaver was decided in 1982. In relevant part, the amendments inserted into the definitional sections of the two Acts the language:

["security" means ...] any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities ...

15 U.S.C. §§77b(1), 78c(a)(10), Pub. L. 97-303, §§1, 2, 96 Stat. 1409. The purpose of the amendments was to expressly include various types of options within the definition of "security" and to make clear the exclusive jurisdiction of the Securities and Exchange Commission over them. H. Rep. No. 97-626 at 2, 9, 97th Cong., 2d Sess., reprinted in (1982) U.S. Code Cong. & Ad. News 2780, 2780, 2788.

The House Report described Weaver as "holding that, under the circumstances of the case, a certificate of deposit issued by a bank subject to regulation by a

domestic bank regulatory agency is not a security" under the 1934 Act. Id. at 10, (1982) U.S. Code Cong. & Ad. News at 2788. Wolf argues that the House Report, which acknowledges that Weaver left "open the question of whether a certificate of deposit could be a security in another context," id., indicates that Congress meant by the amendments to permit security treatment of other certificates in other contexts, specifically those not regulated by a "domestic bank regulatory agency." He contends that Congress has always distinguished between instruments issued by foreign banks and those issued by domestic banks. See 15 U.S.C. §77c(a)(2) (exempting "any security issued or guaranteed by any [domestic] bank" from registration requirements).

Banamex, on the other hand, argues that Congress "codified" the holding of Weaver

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that a certificate of deposit was not a security. It contends that if Congress had meant to "overrule" the holding of Weaver, it would have simply amended the acts to read "or privilege on any security, including a certificate of deposit, or group or index of securities." See 1982 Amendment to the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(36), Pub. L. 97-303, § 5, 96 Stat. 1409; H. Rep. at 10, (1982) U.S. Code Cong. & Ad. News at 2788. Instead, the bank argues, Congress juxtaposed the terms "security" and "certificate of deposit" in such a way as to distinguish them.

As we read the amendments, they do not dispose of the question before us. The legislative history demonstrates that Congress recognized the validity of the precise holding of Weaver on its facts, but at the same time, it also recognized that a

different outcome might result in another context. We see little in the amendments or their legislative history to guide us in determining the outcome in the context before us.

C. Applying the Weaver "insolvency protection" test.

Our decision, therefore, is compelled by the reasoning of Weaver that when a bank is sufficiently well regulated that there is virtually no risk that insolvency will prevent it from repaying the holder of one of its certificates of deposit in full, the certificate is not a security for purposes of the federal securities laws.

There remains the matter of how such regulation is to be proved. The Supreme Court in Weaver was able to take judicial notice of the breadth and adequacy of the federal regulations protecting the holder of a cer-

tificate of deposit issued by Marine Bank. In a situation such as the case before us, where a foreign government's regulatory structure is implicated, the trial court must hear evidence on the degree of protection that structure offers a depositor against insolvency. Because the foreign bank in this situation has better access to such evidence than the certificate holder, the bank shall bear the burden of proving such regulation, as an affirmative defense to a securities law charge. If the adequacy of the regulatory structure is proved, a certificate of deposit issued in a customary banking transaction is not, under Weaver, a security.

In the case before us, it was conceded that the Mexican government's regulation of Banamex provides its certificate holders the same degree of protection against insolvency as does the federal system in this



country. The record shows that Banamex, like all Mexican banks, is supervised by the Banco de Mexico, the National Banking Commission, and the Ministry of Finance and Public Credit. Banamex must adhere to paid-in capital and reserve requirements, and its advertising is subject to the prior approval of the National Banking Commission. It is required to publish monthly financial statements, which must be submitted for approval by the National Banking Commission. That commission also audits the bank annually. Although there was at the relevant time no deposit insurance program, no Mexican bank has failed in the past 50 years. In the event of such a failure, moreover, deposits, including certificates of deposit, by law would constitute preferential claims against all other obligations. See 549 F. Supp. at 853. The depositors in a Mexican bank, therefore, have been "virtually guaranteed" of repay-



ment in full to the same degree as those in United States banks, who are guaranteed of repayment by the Federal Deposit Insurance Corporation, with certain restrictions, see 12 U.S.C. §1821(a)(1).

Thus, because the government regulations imposed on Banamex provide its certificate holders with protection equivalent to that afforded depositors in the federally regulated Marine Bank, Banamex's certificates of deposit are not securities within the meaning of the federal securities acts. Because we find the certificates are not securities, we need not decide the other issues that Banamex raises on appeal.

The judgment appealed from is reversed and this case is remanded for further proceedings consistent with this opinion.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

R. J. WOLF, Plaintiff,

vs.

BANCO NACIONAL de MEXICO, S.A., Defendant.

C 82 1328 WWS

MEMORANDUM OF OPINION AND ORDER

October 26, 1982

This case of first impression requires the Court to decide whether a time deposit in a foreign bank is a "security" within the meaning of the 1933 Securities Act and the 1934 Securities Exchange Act.

In 1981 plaintiff Wolf deposited \$20,000 in each of two ninety-day accounts and in one six-month account with the defendant



Banco Nacional de Mexico (Banamex).

Plaintiff's dollars were converted at the time of deposit into pesos and could not be withdrawn before the accounts matured. The attraction of the accounts was the high interest they yielded: Banamex made monthly payments to Wolf at net annual interest rates of 31.4%, 32.75% and 33.9%.

These impressive yields were more than offset, however, by sizeable losses of principal. Before any of Wolf's accounts had reached maturity, Mexico's central bank, Banco de Mexico (Banxico), abruptly ceased the practice it had followed since 1977 of intervening in the money market in order to maintain a stable rate of exchange between the peso and the dollar. As a result the exchange value of the peso fell immediately and sharply. When Banamex reconverted Wolf's pesos into dollars upon maturity, the \$60,000 principal sum had dwindled to roughly \$35,500.



Plaintiff alleges that Banamex sold him unregistered securities in violation of §12(1) of the 1933 Act, 15 U.S.C. §771(1). He also alleges that a brochure mailed to him by Banamex omitted material information and so misled him in violation of §17(a) of the 1933 Act, 15 U.S.C. §77q(a) (2), §10(b) of the 1934 Act, id. §78j(b), and rule 10b-5, 17 C.F.R. §240.10b-5. The brochure, entitled "Mexico's Other Great Climate ... Investment," stated that

The Mexican peso, like the U.S. dollar, is a floating currency which means that the rate of exchange between the peso and the currency you request your interests [sic] and principal to be paid to you in could vary upwards or downwards between the time you purchase your Time Deposit and maturity. However, since 1977 the Banco de Mexico, Mexico's Central Bank, has maintained a stable peso-dollar parity by intervening in the money market.

Plaintiff contends that the brochure should have included the following material facts: that the parity of the peso



with the dollar depended upon Banxico's continuing intervention; that Banxico would not necessarily continue to intervene; and that if Banxico ceased to intervene, the decline in the peso's value could not only eliminate net return on time deposits but could also cause the depositor to lose much of his principal.

The Court does not reach these fraud claims. Both parties have moved for summary judgment on the dispositive issue of whether plaintiff's time deposits were securities. If the deposits were securities, then Banamex is strictly liable under the 1933 Act for failing to register them. If the deposits were not securities, then this Court has no jurisdiction over any of plaintiff's claims. The Statute

The 1933 Act provides:

When used in this subchapter,



unless the context otherwise requires (1) The term "security means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. §77b(1). Plaintiff asserts that because a certificate of deposit comes within the literal terms of the Act as an "evidence of indebtedness," it is a security. Defendant argues that because the term "evidence of indebtedness" was omitted from the 1934 Act,¹ plaintiff's rule 10b-5 claim must be dismissed. The arid literalism in which both parties engage has been repudiated by the courts, and it is unnecessary to assign the peso

accounts to a particular statutory pigeon-hole.² The Supreme Court has consistently admonished that in determining whether an instrument is a security, "the emphasis should be on economic reality" rather than on the form of the transaction and the letter of the statute. United Housing Foundation, Inc. v. Forman, 421 U. S. 837, 848 (1974) (quoting Tcherepnin v. Knight, 389 U. S. 332, 336 (1967); see American Fletcher Mortgage Co. v. United States Steel Credit Corp., 635 F.2d 1247, 1253 (7th Cir. 1980) ("literal inclusion in the statutory list of potential securities is not the test"), cert. denied, 451 U. S. 911 (1981). In SEC v. C.M. Joiner Leasing Corp., 320 U. S. 344, 350-51 (1943), the Court articulated the guiding principle that courts "will construe the details of an act in conformity with its dominating general purpose, will read text in light of context and will interpret the text so



far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." The statutes expressly invite this inquiry into "context," and the inquiry has largely superseded the language of the Acts; indeed, in some cases it has yielded results that squarely conflict with that language.

An example is the exemption from the 1933 Act -- paralleled by a definitional exclusion from the 1934 Act -- of "[a]ny note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months ..." 15 U.S.C. § 77c(a)(3); see also id. § 78c(10). This provision originated in a letter to Congress from the



Secretary of the Federal Reserve Board. The Secretary described the proposed Securities Act as "intended to apply only to ... investment securities," and suggested an amendment to exclude "short-time paper issued for the purpose of obtaining funds for current transactions in commerce, industry, or agriculture and purchased by banks and corporations as a means of employing temporarily idle funds." Hearings on H.R. 4314, 73rd Cong., 2d Sess. 180 (1933).³ The amendment, in other words, was designed to exempt commercial paper as distinct from investment securities. Judicial interpretations of the exemption have focused on the "commercial" or "investment" nature of a purported security, ignoring altogether the instrument's period of maturity. Notes with a maturity of more than nine months have been excluded from the coverage of the Acts because of their "commercial" character,



see McClure v. First National Bank, 497 F.2d 490 (5th Cir. 1974), cert. denied, 420 U. S. 930 (1975), and notes with a maturity of less than nine months have been included because they represented "investments." See Zabriskie v. Lewis, 507 F.2d 546 (10th Cir. 1974); Bellah v. First National Bank, 495 F.2d 1109 (7th Cir. 1972). The nine-month exemption has thus in effect been deleted from the statute by judicial interpretation.

Similarly, although "stock" is of course included in the statutory list of securities, some "stock" purchases have been excluded from the coverage of the securities laws because they lacked customary attributes of a security. United Housing Foundation, Inc. v. Forman, supra. Loan commitments, on the other hand, may be securities although the Acts make no mention of them. See McGovern Plaza Joint



Venture v. First of Denver Mortgage Investors, 562 F.2d 645, 646 (10th Cir. 1977). In short, the language of the Acts is neither talismanic, as the plaintiff would have it, nor exhaustive, as the defendant urges. The Supreme Court's analysis in the recent decision of Marine Bank v. Weaver, 102 S. Ct. 1220, 71 L.Ed.2d 409 (1982), confirms that the determination whether an instrument is a security does not turn on whether it answers to the particular terms of the statute.

The Weaver case

The Court rejects at the outset defendant's contention that Weaver controls this case. In Weaver the Third Circuit had reversed a summary judgment⁴ in favor of defendant Marine Bank on the ground that a domestic certificate of deposit is "in form and in fact a long-term debt obligation," 637 F.2d 157, 164 (3d Cir. 1981), and hence a sec-



urity. The Supreme Court reversed the Third Circuit because it saw

important differences between a certificate of deposit purchased from a federally regulated bank and other long-term debt obligations. The Court of Appeals failed to give appropriate weight to the important fact that the purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency. The definition of security in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires. It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws. We therefore hold that the certificate of deposit purchased by the Weavers is not a security.

102 S. Ct. at 1224-25. The Court held that the combination of reserve, reporting and inspection requirements imposed by federal banking law and the insurance of deposits



by the Federal Deposit Insurance Corporation (FDIC) obviated the need to protect the purchaser of a domestic certificate of deposit under the securities laws. The purchaser assumes no risk and therefore needs no protection.

Mexican bank deposits are not insured. Banamex urges that Mexican reserve, reporting and inspection requirements are as thorough as their American counterparts. Even if this is so, Weaver does not rest on the independent effect of such requirements on a depositor's risk; and to the extent Weaver invokes those requirements, it appears to emphasize their federal character, referring to "deposits in federally regulated banks ... protected by the ... requirements of the federal banking laws." Id. at 1225 (emphasis added). In this connection it is significant that although Congress exempted bank securities

from the registration provisions of the 1933 Act, it did not extend that exemption to foreign banks.⁵ Weaver thus does not compel the conclusion that Mexican banking laws obviate the application of the securities acts in this case.

Furthermore, plaintiff assumed not only the risk of Banamex's insolvency but also the much more substantial risk of a currency devaluation. Neither of these risks was present in Weaver. The question is then whether a certificate of deposit whose purchaser is not completely insulated from risk is "within the broad sweep of the Act." as Weaver suggests. Id.⁶

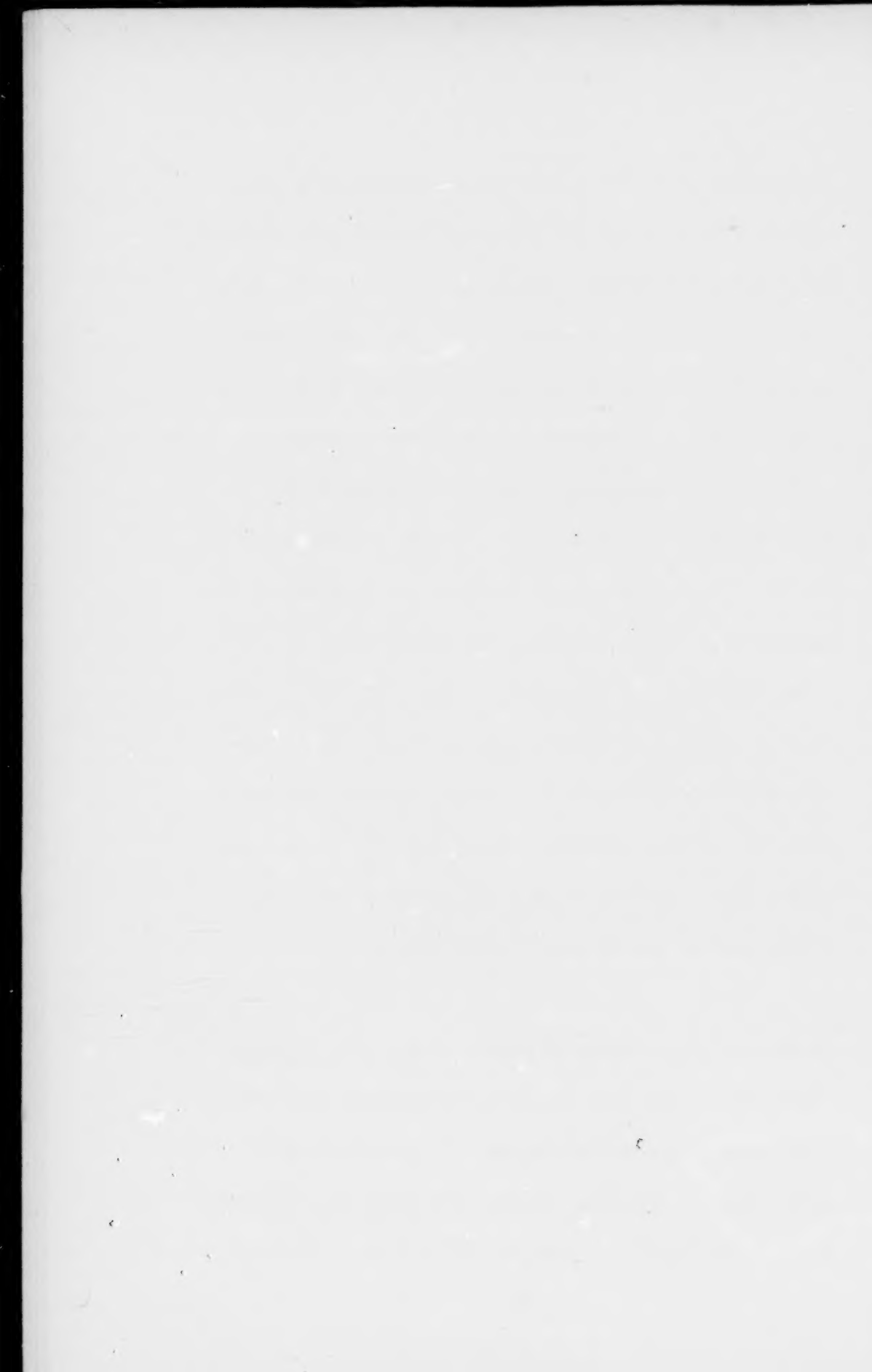
What Is A Security?

The test generally cited for determining whether an instrument or transaction is a security was articulated by the Supreme Court in SEC v. W.J. Howey Co., 328 U. S.



293 (1946). In that case investors purchased plots in an orange grove and leased the land back to the seller under a service contract in which the seller agreed to cultivate and market the crops and to remit the net proceeds to the investor. The Court labelled the arrangement an "investment contract," which it defined as an "investment of money in a common enterprise with profits to come solely from the efforts of others." Id. at 301. The Court described this as a "flexible" definition designed to "meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits." Id. at 299.

Some courts have assumed that the Howey test defines not only investment contracts but the entire universe of securities. See, e.g., United American Bank v. Gunter, 620 F.2d 1108, 1116-19 (5th Cir. 1980);



Goodman v. Epstein, 582 F.2d 388, 406
(7th Cir. 1978), cert. denied, 440 U. S.
939 (1979); Trostle v. Nimer, 510 F. Supp.
568, 572 (S.D. Ohio 1981); Manchester Bank
v. Connecticut Bank & Trust Co., 497 F.
Supp. 1304, 1311-12 (D.N.H. 1980); Hend-
rickson v. Buchbinder, 465 F. Supp. 1250,
1252 (S.D.Fla. 1979). The Supreme Court
itself encouraged this understanding of
Howey by stating in United Housing Foun-
dation, Inc. v. Forman, supra, that the
Howey test

in shorthand form, embodies the es-
sential attributes that run through
all of the Court's decisions de-
fining a security. The touchstone
is the presence of an investment in
a common venture premised on a
reasonable expectation of profits
to be derived from the entrepre-
neurial or managerial efforts of
others. By profits, the Court has
meant either capital appreciation
resulting from the development of
the initial investment, as in Joiner,
supra, (sale of oil leases condi-
tioned on promoters' agreement to
drill exploratory well), or a par-
ticipation in earnings resulting
from the use of investors' funds,
as in Tcherepnin v. Knight, supra



(dividends on the investment based on savings and loan association's profits). In such cases the investor is "attracted solely by the prospects of a return" on his investment.

421 U. S. at 825. In Forman, purchasers of cooperative apartments in a low-cost housing project were required to purchase stock in proportion to the number of rooms acquired. The payment for the stock was treated as a down payment on the apartment. The shares were not transferable to a non-tenant, carried no voting rights, and entitled the holder to no financial return. Inasmuch as the shares thus plainly had none of the investment, profit or risk attributes of a security, the quoted statement of the Supreme Court focusing on the requirement of an expectation of profit goes beyond what was necessary for the decision.

That statement raises serious problems when applied to debt as opposed to equity



instruments. It must be noted that until Forman, the Court had had before it only cases involving purported investment contracts. Not until Weaver was the Court confronted with a debt instrument -- plainly not an "investment contract" -- and it is significant that in deciding that case the Court did not rely on the Howey test.

Although an investor in debt securities is "'attracted solely by the prospects of a return' on his investment," that type of investment lacks the "touchstone ... [of] the presence of an investment in a common venture permitted on a reasonable expectation of profits ..." Forman, supra. The return on debt instruments is fixed and independent of the profits from the enterprise. Some courts, relying on Howey, have thus been led to hold that certain debt instruments are not securities



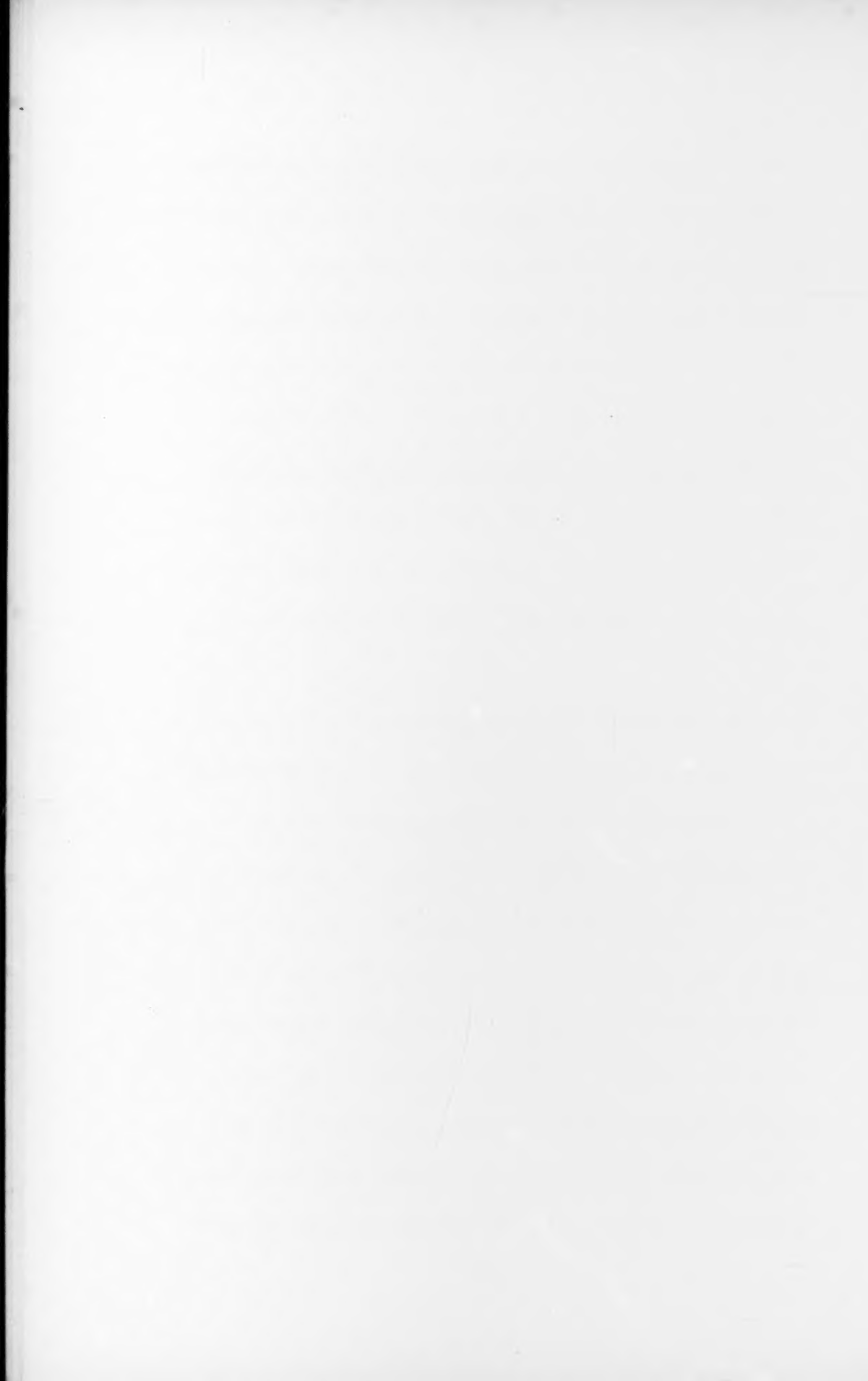
partly because they give rise to no expectation of profit "either over and above or of a different nature than that found in a commercial lending transaction."

United American Bank v. Gunter, supra, 620 F.2d at 1117; see National Bank of Commerce v. All American Assurance Co., 583 F.2d 1295, 1301 (5th Cir. 1978); Canadian Imperial Bank of Commerce Trust Co. v. Fingland, 615 F.2d 465, 470 (7th Cir. 1980) (certificates of deposit); Burres, Cootes & Burres v. MacKethan, 537 F.2d 1262, 1265 (4th Cir. 1976) (same), cert. denied, 434 U. S. 826 (1977); Rispo v. Spring Lake Mews, Inc., 485 F. Supp. 462, 466 (E.D.Pa. 1980); Tri-County State Bank v. Hertz, 418 F. Supp. 332, 343 (M.D. Pa. 1976). But if such an expectation were required of all security purchasers, then debt instruments of all kinds would be excluded from the coverage of the securities laws. It is unlikely that either

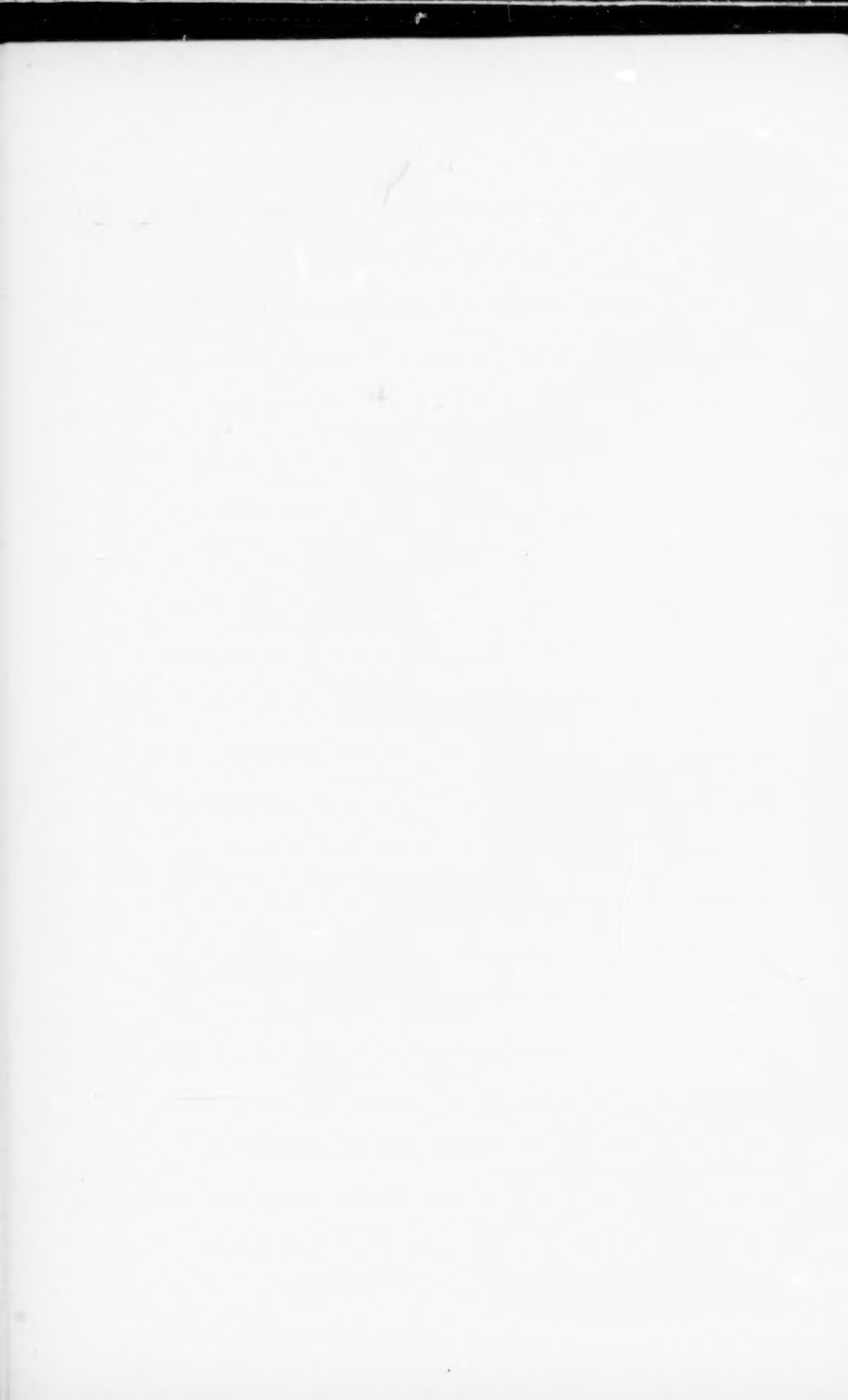


the Congress or the Supreme Court intended that result. The Howey test must therefore be considered to be limited to equity instruments. See Meason v. Bank of Miami, 652 F.2d 542, 549-50 (5th Cir. 1981), cert. denied, 102 S. Ct. 1428, 71 L.Ed.2d 649 (1982); Exchange National Bank v. Touche Ross & Co., 544 F.2d 1126, 1136, (2d Cir. 1976) (Friendly, J.) (test is "of dubious value" as applied to debt instruments).

Having reached that conclusion, the Court must determine what test to apply to debt instruments. The Courts of Appeals have struggled with that question in numerous cases involving a wide variety of instruments and transactions. The Third, Fifth, Seventh and Tenth Circuits have developed what is generally referred to as a "commercial-investment" test. Eschewing an analytical formulation, this test involves a case-by-case determination based on com-



parison of the instrument in question with opposing archetypes: on the one hand, common stock, which is plainly a security; on the other hand, consumer loans and short-term commercial paper, which are just as plainly not. See, e.g., C.N.S. Enterprises, Inc. v. G.&G. Enterprises, Inc., 508 F.2d 1354, 1359 (7th Cir.), cert. denied, 423 U. S. 825 (1975). This test reflects the premise that the securities laws were intended to protect investors but were not meant to impose burdensome obligations on those engaged in ordinary commercial or consumer transactions. See generally S. Rep. No. 47, 73rd Cong., 1st Sess. 1 (1933); Fitzgibbon, "What Is A Security? -- A Redefinition Based on Eligibility to Participate in the Financial Markets," 64 Minn. L. Rev. 893, 915-19 (1980). Perhaps the principal merit of the test -- its simplicity -- is also its demerit: the test provides



little or no guidance to transacting parties and lower courts.

The Ninth Circuit, in a series of cases, has transmuted the Howey "expectation of profit" test into a "risk capital" test. In El Khadem v. Equity Securities Corp., 494 F.2d 1224 (9th Cir.), cert. denied, 419 U. S. 900 (1974), the transaction at issue was a plan offered by an investment company under which the plaintiff borrowed money from the company to purchase mutual fund shares which in turn were pledged as collateral for the loan. The plan offered plaintiff the benefit of tax deductions from prepaying the interest on the loan and the leverage of any increase in the market value of the collateral. The court acknowledged that, unlike in Howey, plaintiff's financial gain would not vary depending on defendant's skill and effort, but it found that the Howey test was none-



theless satisfied because under the terms of the transaction plaintiff did face a risk of financial loss which depended on the skill with which defendant managed the plan. This variation on Howey is of course significant, considering the previously noted limitation of the Howey test, in that it can be applied to debt securities. It has not, however, been endorsed by the Supreme Court. In Forman, the Court specifically declined to accept the approach of the El Khadem court, adding that "[e]ven if we were inclined to adopt such a risk capital approach, we would not apply it in the present case [where] [p]urchasers ... take no significant risk ..." 421 U. S. at 837 n. 24.

In Great Western Bank & Trust v. Kotz, 532 F.2d 1252 (9th Cir. 1976), the Ninth Circuit applied the "risk capital" test to a note given by a corporation to a bank in



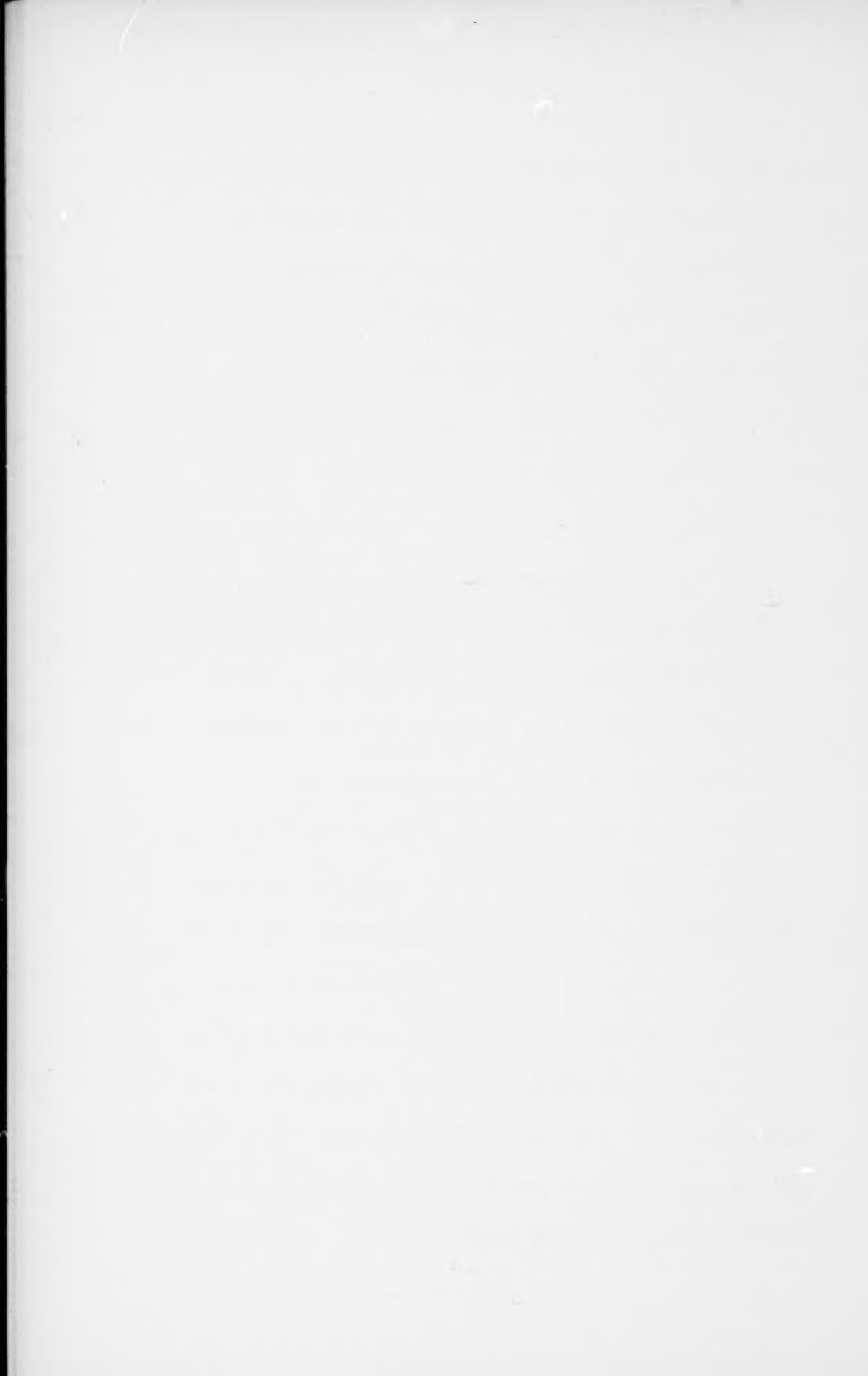
exchange for a ten-month, renewable line of credit. To determine whether the transaction was a security, the court examined "the nature and degree of risk accompanying the transaction for the party providing the funds." 532 F.2d at 1256. Distinguishing between a "risky loan" and "risk capital," it developed a set of six factors to frame the analysis: (1) the length of time during which the funds are at risk; (2) whether the funds are collateralized; (3) whether the obligation was issued to a single party or numerous investors; (4) the relationship of the sum involved to the size of the borrower's business; (5) whether the funds are used as capital or to finance current operations; and (6) the form of the obligation. It then proceeded to apply these factors to the transaction, holding the note not to be a security because, in view of the severe restrictions imposed on the borrower, the



risk "created by the lending of money ... amounted only to that risk normally associated with the lending of money for a period of time" and was not dependent on the borrower's "enterprise efforts."

532 F.2d at 1259-60. Judge Wright concurred, giving as an additional reason that the transaction was a commercial loan.

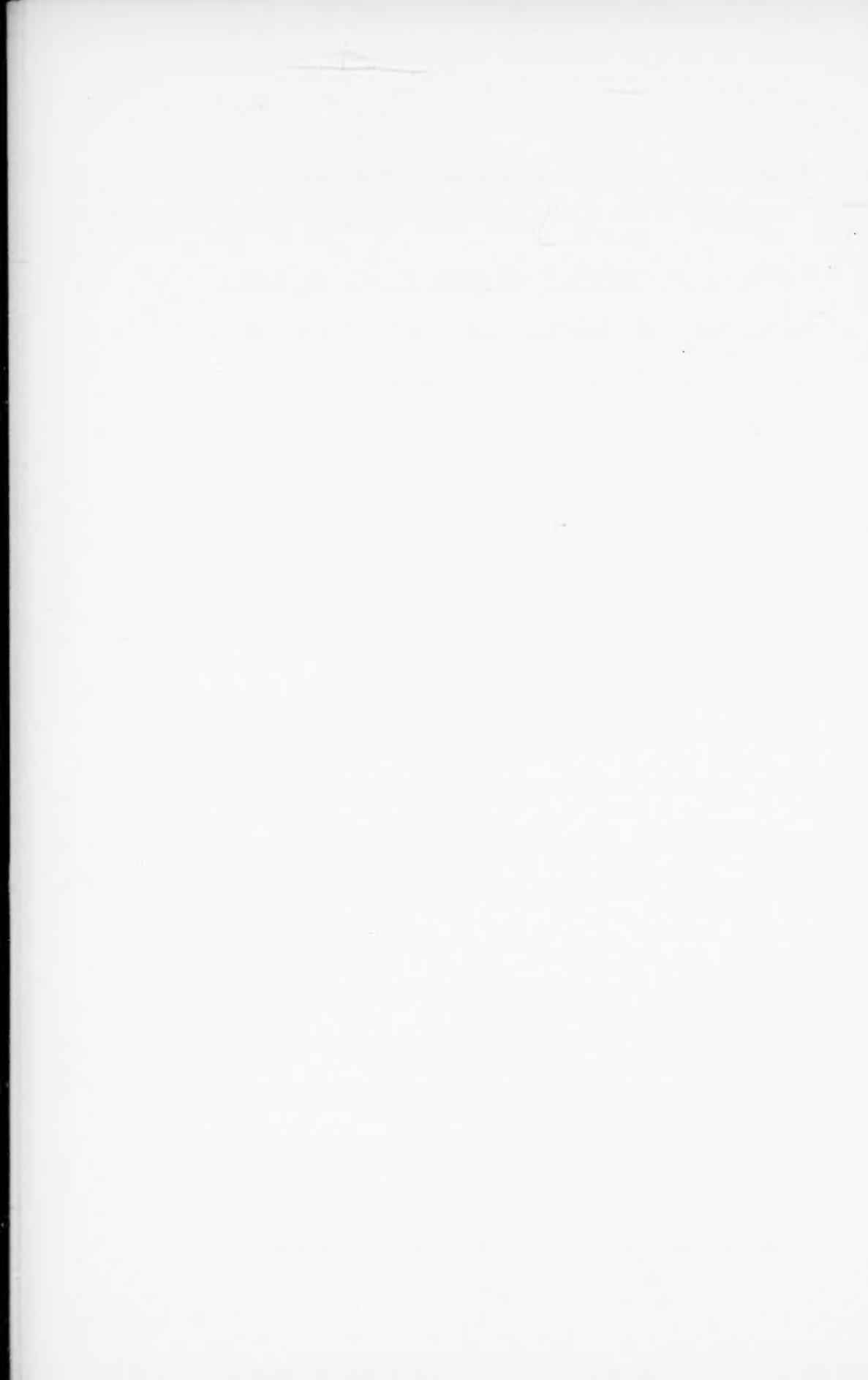
The same analysis was applied in United California Bank v. THC Financial Corp., 557 F.2d 1351 (9th Cir. 1977), in which the court held that an agreement by one corporation to purchase from a bank all of the notes given to the bank by another corporation to evidence a commercial loan in the event the latter corporation defaulted was not a security. After reviewing the evidence in the light of the six factors, the court concluded that this was a commercial lending arrangement between sophisticated parties with equal



access to the relevant information.

Finally in Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (9th Cir. 1978), the court applied the "risk capital" test to a note issued to obtain a construction loan, secured by a deed of trust and by various provisions of the building loan agreement. After reviewing the six factors, the court held that "Amfac was making a construction loan to finance a shopping center. A note given to a lender in the course of a commercial financing transaction is not a security." 583 F.2d at 434.

It is clear that the "risk capital" test departs from the essential requirement of Howey, as refined in Forman, that there be "an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepre-



neurial or managerial efforts of others."⁷
421 U. S. at 852. It does so because the exigencies of commercial life require a feasible test for the application of the securities acts to debt instruments. A close examination of the decisions in which that test was developed and applied, however, raises serious questions about its analytical viability. Each of the six factors is open-ended, leaving it to the courts to speculate, for example: how short a maturity is too short; what ratio of loan to assets is too high; and where to draw the line between "capital" and funds for current operation (working capital). Even if it were possible to define the individual factors with any precision, the courts are left at large with respect to how much weight to attach under the circumstances of the particular case to the presence - or the absence - of each of the six factors or of other



possibly relevant factors not identified in the "risk capital" test.⁸ See Exchange National Bank v. Touche Ross & Co., supra, 544 F.2d at 1137. It is difficult to see, moreover, how the court distinguishes investment risk from credit risk. See, e.g. Great Western Bank & Trust v. Kotz, supra, 532 F.2d at 1259 ("While some 'risk' was created by the lending of money, it amounted only to that risk normally associated with the lending of money for a period of time."). Finally, the court's opinions themselves suggest that, after exhausting the "risk capital" analysis, the court made its decision by applying what amounts to a "commercial-investment" dichotomy. See, e.g., Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., supra, 583 F.2d at 434 ("Amfac was not making an investment ... [it] was making a construction loan ...").



The problems inherent in the "risk capital" test as a yardstick on which business and courts should be able to rely become obvious when that test is applied to the instant case: (1) Wolf's money was at risk for only six months or less. (2) His accounts, although not collateralized, were collectible out of the ample assets of Banamex. (3) The transaction was not individually negotiated, since Wolf was presumably only one of many persons who make such deposits. (4) Wolf's account, and presumably the aggregate of such accounts, was miniscule in relation to Banamex's total business and assets. (5) It is unlikely that funds from such accounts were put to any particular use rather than to augment Banamex's assets generally. (6) Although the transaction took the form of a bank deposit, such deposits were promoted and widely solicited by Banamex as investments.

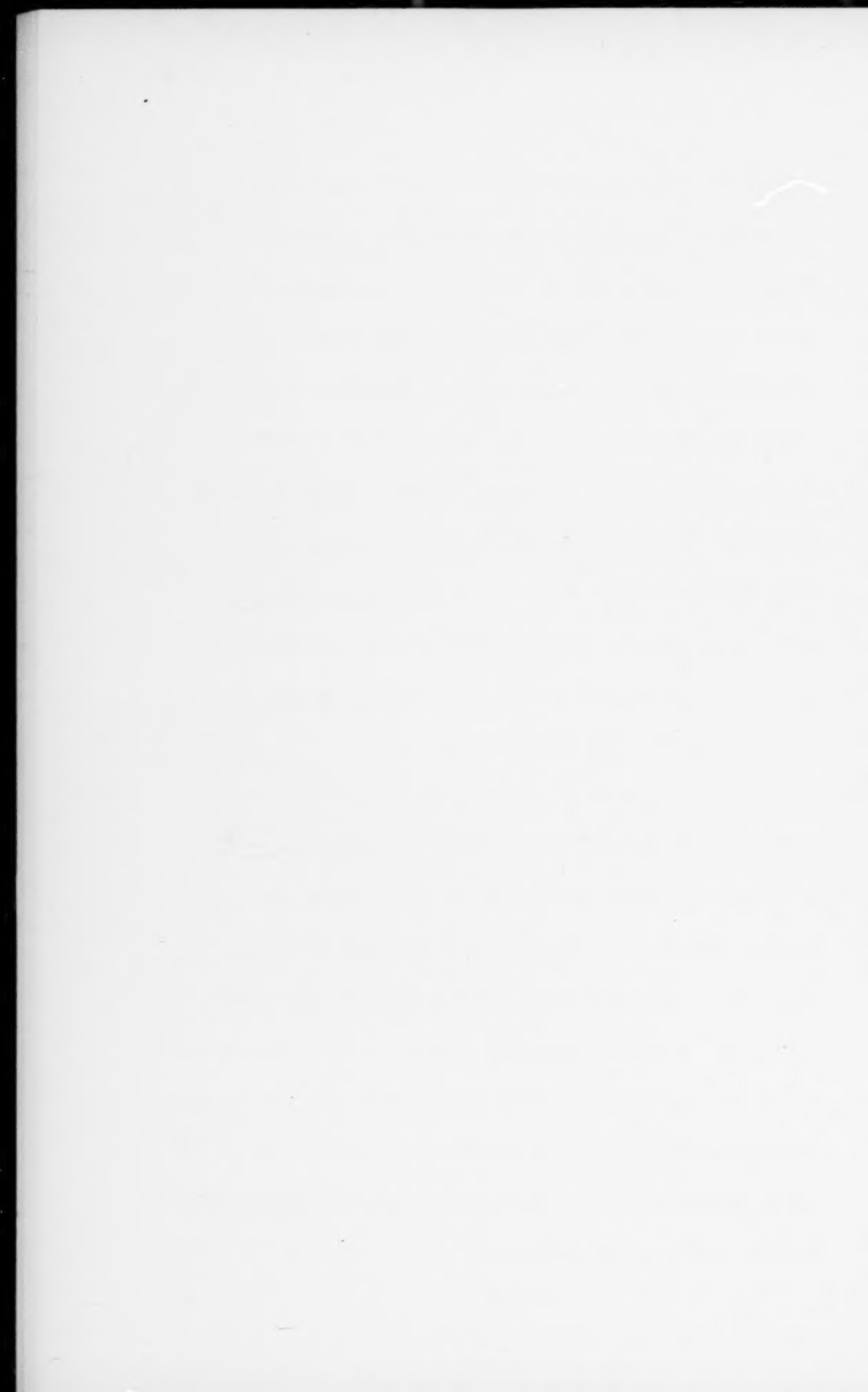
Thus, the measure of risk (factors (1), (2) and (4)) argue against finding a security. Yet the indicia of investment (factors (3), (5) and (6)) tend to support such a finding. Nothing in the six-factor analysis, or in the evidence underlying the various factors, helps to determine the weight to be given to one side of the balance or the other. Here three factors lead to one conclusion while an equal number leads to the opposite conclusion. The risk capital analysis cannot yield a principled decision in this case.

A close reading of the decisions purporting to apply the "risk capital" test or the "commercial-investment" test suggests that the process of decision in those cases rests less on analysis than on synthesis. The courts do not embrace particular reasons for decision with any



consistency; they have sought instead to arrive at results which would maintain consistency within the growing body of case law under the securities acts. Consistency and harmonization form a thread that runs through the decisions. See, e.g., Meason v. Bank of Miami, supra, 652 F.2d at 550; Amfac Mortgage Corp., supra, 583 F.2d at 431 & n.6; McClure v. First National Bank, supra, 497 F.2d at 492; Tri-County State Bank v. Hertz, supra, 418 F. Supp. at 342 n.5.

Once one acknowledges the limitations of a multi-factor analytical approach to cases where the factors lack definition and defy weighting,⁹ the way out of the confusion thus becomes clear. The large body of authoritative case law can be synthesized into a framework for decision that accommodates the universe of instruments and transactions.



What Is Not A Security?

The most direct and reliable approach¹⁰ to deciding cases, such as this one, involving instruments or transactions that unquestionably exhibit the elements most commonly associated with securities is to include them within the meaning of a "security" unless they fall into certain well-defined categories. Cf. Exchange National Bank v. Touche Ross & Co., supra, 544 F.2d at 1137.¹¹ This approach is consonant with the structure of the definitional provisions of the Acts, according to which virtually any transaction in which one person provides funds to another with the expectation of gain is a security unless "the context otherwise requires." The acts leave to the courts and the SEC the task of developing a definition of what is not a security, and case law has defined the requirements of context sufficiently to comprehend almost all situa-



tions likely to arise.

The cases, both in the Ninth Circuit and elsewhere, establish that a transaction in which one person ("the investor") provides funds to another¹² with the expectation of a financial or economic benefit¹³ is a security unless: (a) the benefit derives largely from the managerial efforts of the investor;¹⁴ or (b) the investor receives something of intrinsic value which he intends to use or consume;¹⁵ or (c) the provider of funds is in the business of lending funds in such transactions;¹⁶ or (d) the person to whom the investor provides funds is merely the investor's agent;¹⁷ or (e) the transaction is virtually risk-free to the investor by reason of governmental regulation.

The question is whether Wolf's peso accounts fall within any of the exclusions.



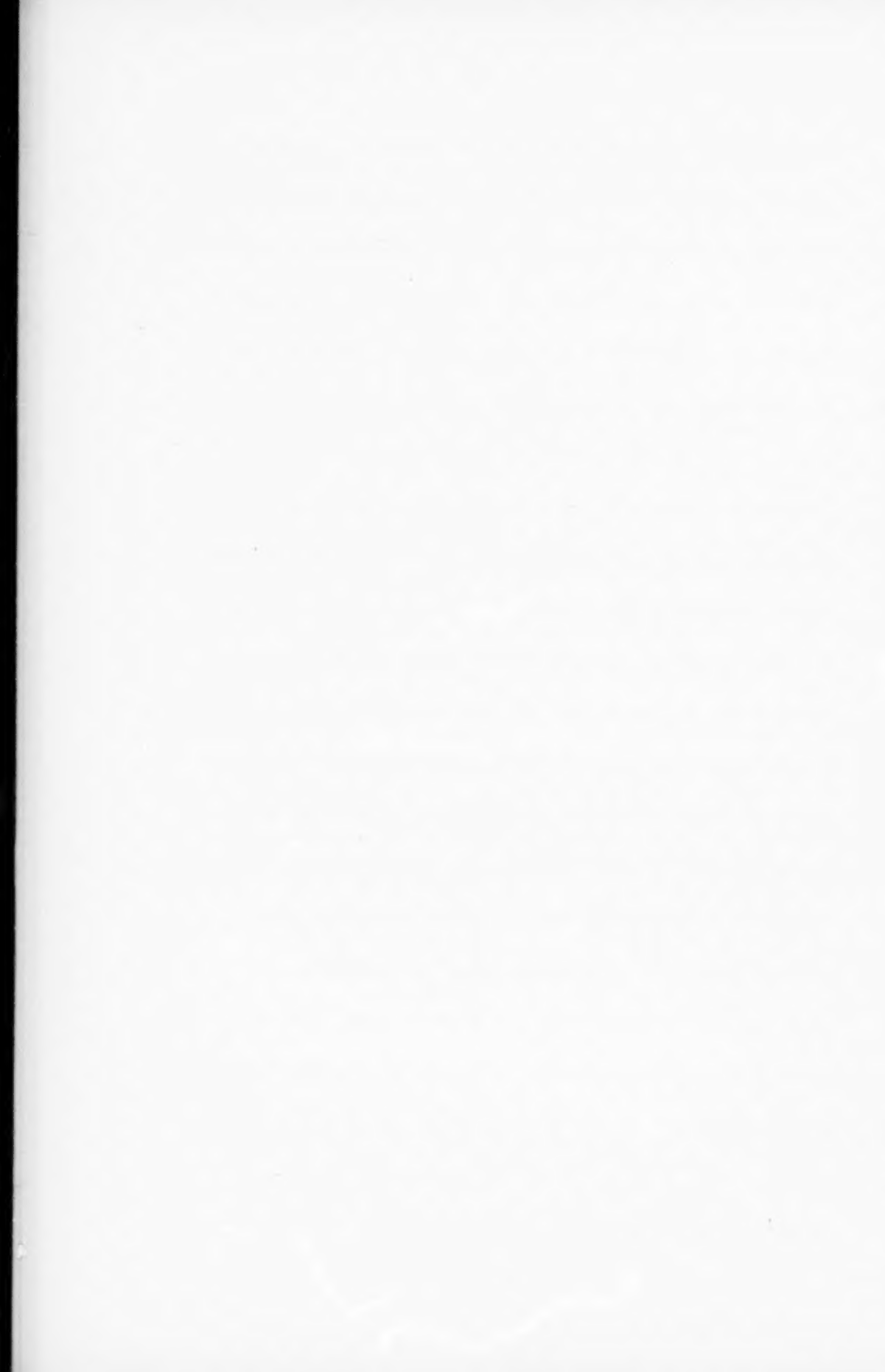
Only exclusion (e) could apply to these accounts. The rationale of that exclusion is that the protection afforded by the securities acts is not needed because other governmental regulation largely eliminates risks that would otherwise be faced by the "investor." See Weaver, 102 S. Ct. at 1224-25.¹⁸ See also United Housing Foundation, Inc. v. Forman, *supra*, 421 U. S. at 857, where the Court, in a footnote, rejected the application of the "risk capital" approach to the facts of the case because the purchasers of the apartments "take no risk in any significant sense;" if dissatisfied, they could recover their initial investment, and state regulation and nearly total state financing made bankruptcy an "unrealistic possibility." And see SEC v. Variable Annuity Life Insurance Co., 359 U. S. 65, 77, 90-91 (1959) (Brennan, J., concurring) (variable annuity contracts are securities



because the risks of insolvency against which state insurance regulation protects differ from the risks of fluctuating values of share interests for which the protection afforded by the securities acts is needed).

In this case it is not contested that Mexico thoroughly regulates its banks and that no Mexican bank has become insolvent in fifty years. That is not enough, however, to make Wolf's investment virtually free of risk. Indeed, governmental regulation has no effect on the essential risk to which an investor in foreign time deposits is exposed -- the risk of devaluation.¹⁹ Because the rationale of Weaver is inapplicable here, the Court holds that plaintiff's time deposits were securities.

Liability Under The 1933 Act



Section 12(1) of the Securities Act provides that any person who offers or sells an unregistered security "shall be liable to the person purchasing such security from him, who may sue ... to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U.S.C.

§771(1) (emphasis added). Liability under this section is "absolute"; a purchaser may recover damages "regardless of whether he can show any degree of fault, negligent or intentional, on the seller's part."

Lewis v. Walston & Co., 487 F.2d 617, 621 (5th Cir. 1973) (Wisdom, J.); see also Mason v. Marshall, 412 F. Supp. 294, 300 (N.D. Tex. 1974) (plaintiff need not prove materiality of information in registration statement or probability that he would have relied on it), aff'd, 531 F.2d 1274



(5th Cir. 1976).

Liability under §12(1) is established by proof that: (1) the securities were not registered; (2) the defendant sold the securities to the plaintiff; and (3) the mails were used in making the sale. Lewis v. Walston & Co., supra, 487 F.2d at 621. There is no dispute as to any of these elements of liability. Accordingly, plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. The parties will bear their own costs.

IT IS SO ORDERED.

DATED: October 26, 1982.

WILLIAM W SCHWARZER
United States District Judge



FOOTNOTES

1. Except for that omission, the 1934 Act contains a definition of "security" that is essentially identical to its 1933 counterpart.

When used in this chapter, unless the context otherwise requires -- ...

(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10). The 1933 and 1934 definitions are construed indistinguishably. *United Housing Foundation, Inc. v. Forman*, 421 U. S. 837, 847 n.12 (1975); *Tcherepnin v. Knight*, 389 U. S. 332, 335-36 (1967); *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 431 (9th Cir. 1978). This opinion therefore draws on the case law under both Acts, even though the Court does not reach plaintiff's claims under the 1934 Act.

2. Certificates of deposit have been labelled not only "evidences of indebtedness" but also "investment contracts," see MacKethan v. Peat, Marwick, Mitchell & Co., 438 F. Supp. 1090, 1094 (E.D. Va. 1977); Superintendent of Insurance of New York v. Bankers Life & Casualty Co., 300 F. Supp. 1083, 1110 (S.D.N.Y. 1969), and "notes," Bankers Life, id.

Typically, however, the courts simply look to the judicially established criteria of a "security" without attempting to fit the instrument or transaction into one of the statutes' terms. See, e.g., Hamblett v. Bd. of Savings & Loan Ass'n's, Inc., 472 F. Supp. 158, 165 (N.D. Miss. 1979); Hendrickson v. Buchbinder, 465 F. Supp. 1250, 1252 (S.D. Fla. 1979).

3. The SEC interpreted the exemption as applicable to "prime quality negotiable commercial paper of a type not ordinarily purchased by the general public, that is, paper issued to facilitate well-recognized types of current operational business requirements, and of a type eligible for discounting by Federal Reserve banks." Release No. 33-4412, 17 C.F.R. §231.4412 (1961).

4. The impropriety of summary judgment on the question whether plaintiff had purchased a security was the principal basis of the Third Circuit's opinion. The Supreme Court ignored that issue, implicitly deciding that the status of Weaver's certificate of deposit did not turn on any disputed question of fact.

The existence of a security is a mixed question of law and fact. To the extent that the relevant facts are undisputed,



the question is one of law, appropriately resolved by summary judgment. See United States v. Fishbein, 446 F.2d 1201, 1207 (9th Cir. 1971), cert. denied, 404 U. S. 1019 (1972); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 639 (9th Cir. 1969). If, however, a party identifies disputed facts that are material to determining whether a security has been purchased, the question becomes one of fact and cannot be resolved summarily. See Great Western Bank & Trust Co., v. Kotz, 532 F.2d 1252, 1260 (9th Cir. 1976); Roe v. United States, 287 F.2d 435, 440 (5th Cir.), cert. denied, 368 U. S. 824 (1961).

Here the material facts are undisputed. There is accordingly no question that summary judgment is appropriate.

5. "For purposes of this paragraph, ... the term 'bank' means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia ..." 15 U.S.C. §77c(a)(2).

6. In a footnote, the Weaver Court remarked that a certificate of deposit does not "invariably fall[] outside the definition of a security ... Each transaction must be analyzed and evaluated on the basis of ... the factual setting as a whole." 102 S. Ct. at 1225 n.11.

7. In Forman the Supreme Court based its decision that shares in a cooperative housing corporation were not securities in part on the absence of any expectation by the shareholders of a "financial" benefit. "[T]here can be no doubt that investors were attracted solely by the prospect of acquiring a place to live, and not by



financial returns on their investments." 421 U. S. at 853. The Court defined "financial returns" or profits as "capital appreciation resulting from the development of the initial investment ... or a participation in earnings resulting from the use of investors' funds." Id. at 852.

Such a test poses obvious difficulties. Almost any investor in real estate, even if it is a personal residence as in For-man, is likely to have an eye on prospective "capital appreciation." Moreover, the fact that an investor, rather than looking for capital appreciation or earnings, has settled for a guaranteed fixed return (as in the case of many bonds) does not necessarily make the policies underlying the securities acts inapplicable.

Furthermore, the requirement of a "financial" return is at odds with the risk capital test followed in this Circuit, which focuses retrospectively on what the investor stands to lose rather than prospectively on what he expects to gain. In the original risk capital opinion, for example, the California Supreme Court held that where membership fees were used to develop a country club, the membership interests were securities. Justice Traynor wrote that the object of securities legislation is

to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures, whether they expect a return on their capital in one form or another. Hence the act is as clearly applicable to the sale of promotional memberships as it



would be had the purchasers expected their return in some such familiar form as dividends. Properly so, for otherwise it could easily be vitiated by inventive substitutes for conventional means of raising risk capital.

Silver Hills Country Club v. Sobieski, 55 Cal.2d 811, 13 Cal.Rptr. 186, 188-89, 361 P.2d 906, 908-09 (1961).

The absence of an expectation of financial return was not crucial to the Supreme Court's decision in Forman. The main point in that case was that the shareholders received something of intrinsic value -- a place to live. Forman thus comes within paragraph (b) of this Court's definition set forth on page 56, infra.

8. In Great Western Bank & Trust v. Kotz, supra, 532 F.2d at 1257, the court did identify time as "the most important factor," but it also observed: "We do not hold that application of any single factor ... compels us to affirm the district court. Nor do we intimate that in a different case there would not be other factors to consider." Id. at 1258.

As to the weight to be attached to the form or label of the transaction, compare SEC v. Joiner Leasing Corp., 320 U. S. 344, 353 (1943) ("it is not inappropriate that promoters' offerings be judged as being what they were represented to be") with United Housing Foundation, Inc. v. Forman, 421 U. S. 837, 850 (1975) ("the name given to an instrument is not dispositive").

9. It goes without saying that in this



as in many other areas of the law predictability ranks as high on the scale of institutional values as soundness of result. The instant case presents a good example: institutions such as Banamex ought to be given the means of predicting with reasonable assurance whether a financial program involving large numbers of transactions is subject to the registration and other provisions of the securities acts. Even more important, due process requires that the application of the criminal securities fraud statutes not be left to guesswork and speculation. This problem is suggested by cases such as *United States v. Carman*, 577 F.2d 556, 563-64 (9th Cir. 1978) (conviction for securities fraud upheld where defendant had sold packages of notes, given by students for loans, subject to loan service and repurchase provisions; court held that purchaser's "risk of loss is sufficient to bring the transaction within the meaning of a security, even where the anticipated financial gain is fixed").

10. This Court is of course bound by the law of the Ninth Circuit, and this decision is founded on that principle. But the Court views that law, in accordance with the common law tradition, as residing more in the results reached by the cases than in the articulation of particular reasons for those results. See III R. Pound. Jurisprudence (1959) 564-66.

11. In Touche Ross, Judge Friendly, seeing little prospect for success in "the efforts to provide meaningful criteria for decision under 'the commercial-investment' dichotomy," and "not ... much force in the ... 'risk capital' test," adopted a literalist approach, placing on the



party asserting that a note otherwise within the literal language of the act is not a security the burden of showing that the "context otherwise requires." That approach, however, fails to impart any certainty or predictability to the application of the "context" exclusion. As the following discussion seeks to show, a considerable degree of predictability can be derived by importing into the literalist approach the substance of the existing decisional law. While doing so will not enable parties or lower courts to predict with certainty the outcome of an appeal, it provides them with helpful guidelines.

12. A compulsory, noncontributory pension plan is not a security because the employee provides no funds. See Int'l Bhd. of Teamsters v. Daniel, 439 U. S. 551 (1979); Dudo v. Schaffer, 82 F.R.D. 695 (E.D. Pa. 1979).

13. See note 7 supra.

14. A franchise is ordinarily not a security because the franchisee's returns are a function of his own efforts. See Martin v. T.V. Tempo, Inc., 628 F.2d 887 (5th Cir. 1980); Bitter v. Hoby's Int'l, Inc., 498 F.2d 183 (9th Cir. 1974); Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973); Mr. Steak, Inc. v. River City Steak, Inc., 460 F.2d 666 (10th Cir. 1972); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635 (9th Cir. 1969) (distributorship). The unconventional franchise purchased by a participant in a pyramid promotion scheme is a security, however, because the "critical determinant" of the success of the enterprise is the luring effect of meetings run by the franchisor alone. SEC

v. Koscot Interplanetary, Inc., 497 F.2d 473, 485 (5th Cir. 1974); see SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir.), cert. denied, 414 U. S. 821 (1973). In Turner the court held that the crucial inquiry is "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." Id. at 482. The investor in a pyramid promotion scheme purchases merely a "share in the proceeds of the selling efforts" of the promoter. Id.

The same reasoning applies to real estate transactions in which the vendee enters into a management or development contract with the vendor. If the investor retains ultimate control over the land and is to develop it largely through his own efforts, he has not purchased a security. See Schultz v. Dain Corp., 568 F.2d 612 (8th Cir. 1978); Happy Investment Group v. Lakeworld Properties, Inc., 396 F. Supp. 175, 180-81 (N.D. Cal. 1975). If, however, the "real burden of management and development" is on the vendor, the vendee has purchased a security. Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1040 (10th Cir. 1980); see SEC v. W.J. Howey Co., 328 U. S. 293, 300 (1946); Cameron v. Outdoor Resorts of America, 608 F.2d 187, 192 (5th Cir. 1979); SEC v. Bailey, 41 F. Supp. 647 (S.D. Fla. 1941); Lowery v. Ford Hill Investment Co., 192 Colo. 125, 556 P.2d 1201 (1976). The SEC has outlined the criteria for determining whether collateral arrangements transform the purchase of real estate into a security transaction. See SEC Rel. No. 33-5347, 17 C.F.R. §231.5347, 38 Fed.Reg. 1735 (1973).



15. See note 7 supra; Forman, 421 U. S. at 852-53; Howey, 328 U. S. at 300; B. Rosenberg & Sons, Inc. v. St. James Sugar Cooperative, Inc., 447 F. Supp. 1, 4 (E.D. La. 1976) ("When a purchaser is motivated by a desire to use what he has purchased, the securities laws do not apply."), aff'd, 565 F.2d 1213 (5th Cir. 1977); Fogel v. Sellamerica, Ltd., 445 F. Supp. 1269, 1277-78 (S.D.N.Y. 1978) (residential lots); Joyce v. Ritchie Tower Properties, 417 F. Supp. 53 (N.D. Ill. 1976) (condominiums); Contract Buyers League v. F & F Investment, 300 F. Supp. 210, 224 (N.D. Ill. 1969) (used residential property), aff'd, 420 F.2d 1191 (7th Cir.), cert. denied, 400 U. S. 821 (1970); SEC v. Bailey, 41 F. Supp. 647, 650 (S.D. Fla. 1941) (investment in tung groves was a security because purchasers bought land not "for its intrinsic value" but "as a source of income").

16. This accounts for the result in most cases in which courts have wrestled with some form of the commercial/investment dichotomy. See, e.g., American Fletcher Mortgage Co., Inc. v. U. S. Steel Credit Corp., 635 F.2d 1247 (7th Cir. 1980); cert. denied, 451 U. S. 911 (1981); United American Bank v. Gunter, 620 F.2d 1108 (5th Cir. 1980); Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426 (9th Cir. 1978); United California Bank v. THC Financial Corp., 557 F.2d 1352 (9th Cir. 1977); McGovern Plaza Joint Venture v. First of Denver Mortgage Investors, 562 F.2d 645 (10th Cir. 1977); C.N.S. Enterprises Inc. v. G. & G. Enterprises, Inc., 508 F.2d 1354 (7th Cir.), cert. denied, 423 U. S. 825 (1975); McClure v. First Nat'l Bank, 497 F.2d 490 (5th Cir. 1974), cert. denied, 420 U. S. 930 (1975); Bellah



v. First Nat'l Bank, 495 F.2d 1109 (5th Cir. 1974); Provident Nat'l Bank v. Frankford Trust co., 468 F. Supp. 448 (E.D. Pa. 1979); Tri-County State Bank v. Hertz, 418 F. Supp. 332 (M.D. Pa. 1976). Only once, however, has the business of the provider of funds been made an explicit basis for decision. In Great Western Bank & Trust v. Kotz, 532 F.2d 1252 (9th Cir. 1976), the Ninth Circuit held that the plaintiff bank had made a loan rather than purchased a security. Judge Wright concurred on the ground that banks are generally not investors:

In an investment situation, the issuer has superior access to and control of information material to the investment decision. Rather than relying solely on semi-anonymous and secondhand market information, as do most investors, the commercial bank deals "face-to-face" with the promisor. The bank has a superior bargaining position and can compel wideranging disclosures and verification of issues material to its decision on the loan application.

Id. at 1262.

The situation described in Kotz is to be distinguished from that presented in Exchange Nat. Bank v. touche ross & Co., supra. Although the transaction there also involved a bank, it consisted of the bank's purchase of notes from a brokerage firm, implemented not through normal lending channels but by its chief administrative officer in order to develop a closer relationship with the firm. Moreover, the funds were to become a part of the firm's capital in accordance with



stock exchange requirements. These and other characteristics led the court to find that the notes were securities.

17. The concept of agency is relevant in a number of contexts. One of them has been discussed already -- the purchase of real estate attended by collateral management agreements. See not 14 supra. If the landowner retains ultimate control but "does not wish to manage a property himself and delegates the responsibility to an agent," he does not hold a security. Schultz v. Dain Corp., 568 F.2d 612, 615 (8th Cir. 1978).

A general partnership (or a share in a joint venture) is not a security; the partners are mutual agents. See Williamson v. Tucker, 645 F.2d 404 (5th Cir.), cert. denied, 454 U. S. 897 (1981); Hirsch v. DuPont, 396 F. Supp. 1214 (S.D.N.Y. 1975), aff'd, 553 F.2d 750 (2d. Cir. 1977); Oxford Finance Co. v. Harvey, 385 F. Supp. 431 (E.D. Pa. 1974).

A discretionary trading account in commodities is not a security. Brodt v. Bache & Co., 595 F.2d 459 (9th Cir. 1978). According to the Ninth Circuit, the investor in such accounts does not put his funds into a "common enterprise" as required by the Howey doctrine because the investor may lose money while his broker earns a substantial commission. But there is no requirement that the holder of a security gain or lose in proportion to the enterprise in which he invests; if there were, the bonds of a faltering company would not be securities. A commodities account is indeed an individual enterprise, but for a different reason: the broker is a mere agent of the investor. His judg-



ment is substituted for that of the provider of funds on whose behalf he acts. The investor delegates authority; he does not invest in the brokerage house. See also McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338 (E.D. La. 1972); Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 253 F. Supp. 359 (S.D.N.Y. 1966).

The concept of agency also explains, for example, the decision in SEC v. Energy Group of America, Inc., 459 F. Supp. 1234 (S.D.N.Y. 1978) (service assisted customers in BLM lottery for oil and gas leases).

18. The rationale which appears to underlie Weaver is that government regulation sufficiently mitigates the risks to which the investor is exposed to obviate the need to apply the securities acts. That rationale has validity when applied to the issuance by the bank of the certificate of deposit to the Weavers, inasmuch as it is the risks faced by the Weavers in that transaction against which government regulation protects. The Weaver case, however, involved the pledge by the Weavers to the bank of the certificate as security for a loan to third parties, and the alleged fraud by the bank to induce that pledge. It is difficult to see (assuming the pledge to be a "purchase or sale" within the meaning of the acts) how government regulation could have protected the Weavers against the alleged fraud in that transaction.

It can of course be argued that once an instrument is found to be a security within the meaning of the acts, it retains that character throughout subsequent transactions, including pledges. The converse, however, is not necessarily true. But see



Weaver, 102 S. Ct. at 1225 n.9 (rejecting summarily "respondent's argument that the certificate of deposit was somehow transformed into a security when it was pledged even though it was not a security when purchased"). That an instrument presumptively a security is treated as exempt when issued because of the protection afforded the investor through government regulation in that transaction does not necessarily mean that it should also be exempt in later transactions in which no such protection is afforded.

Weaver presents the relatively rare case of a fraud allegedly committed by, rather than against a person in the business of lending funds in commercial transactions. See exclusion (c), supra. It suggests the need for an independent analysis whenever the securities acts are invoked not by the person providing the funds but by another party to the transaction.

19. That type of risk is specifically identified in the SEC's Regulation S-K governing registration statements under the 1933 Act:

10. Foreign private registrants should discuss briefly any pertinent governmental economic, fiscal, monetary, or political policies or factors which have materially affected or could materially affect, directly or indirectly, company operations or investments by United States nationals.

17 C.F.R. §229.20, Item 11, Instruction 10.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. J. WOLF, Plaintiff-Appellee,

vs.

BANCO NACIONAL de MEXICO, S.A.,
aka BANAMEX, Defendant-Appellant.

No. 83-1534

OPINION

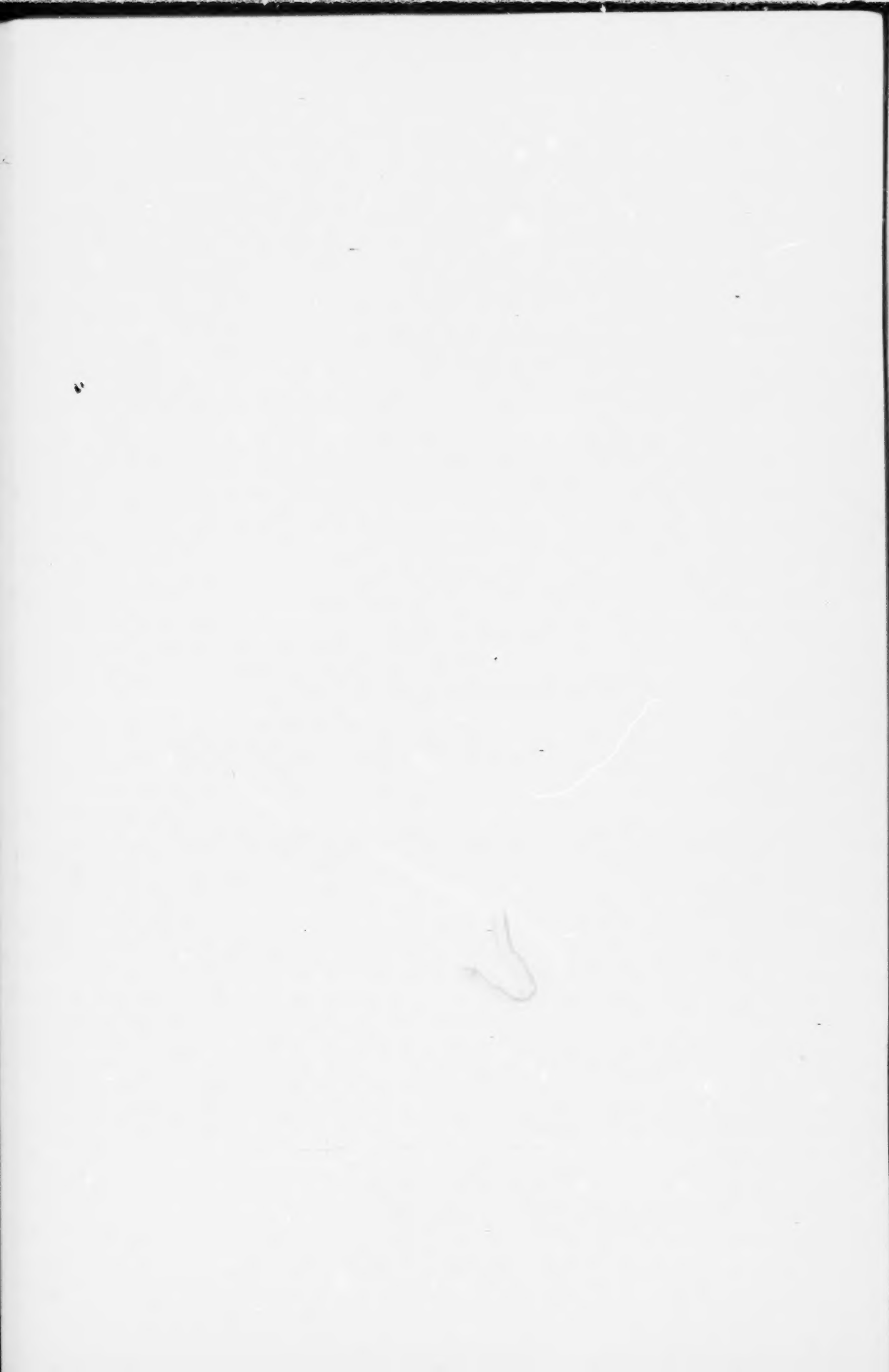
December 6, 1983

Before: DUNIWAY, WALLACE and PREGERSON,
Circuit Judges

DUNIWAY, Circuit Judge:

The judgment appealed from does not dispose of all issues in the case and is therefore not an appealable judgment. The appeal must be dismissed.

The second amended complaint alleges three



claims for relief. The first charges violation of 15 U.S.C. § 77v and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, in the solicitation of, and obtaining from Wolf, time deposits, in pesos, by means of the mail, the securities not being registered. The second charges that Wolf was defrauded by Banamex in the transactions. The third charges violation by Banamex of § 25110 of the California Corporations Code which is actionable under § 25503.

On cross motions for summary judgment, the court granted Wolf's motion and denied Banamex's motion. In its opinion, the court considered only the first claim for relief. Its reason is as follows:

The Court does not reach these fraud claims. Both parties have moved for summary judgment on the dispositive issue of whether plaintiff's time deposits were securities. If the deposits were securities, then Banamex is strictly liable under the 1933 Act



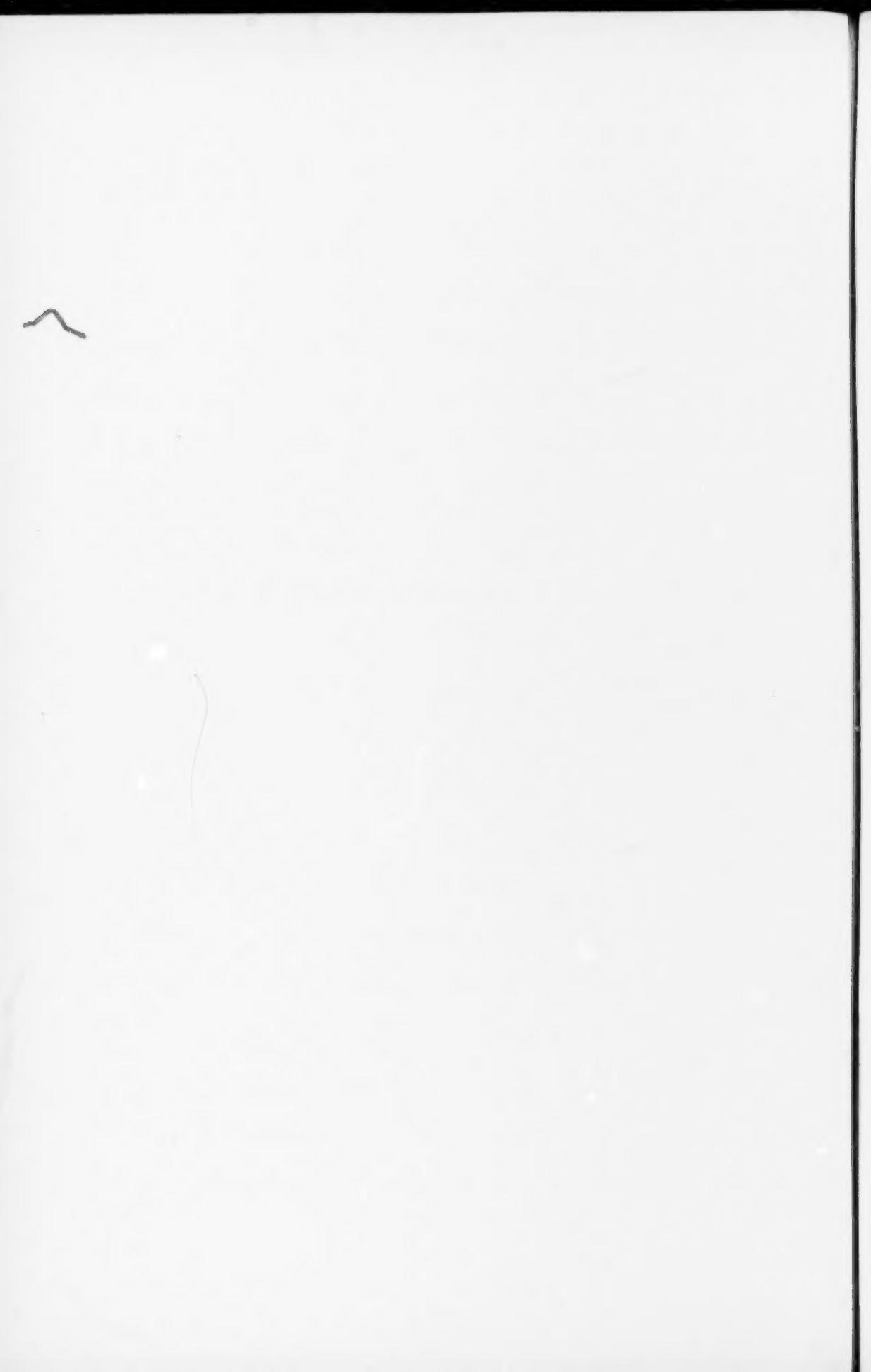
for failing to register them. If the deposits were not securities, then this Court has no jurisdiction over any of plaintiff's claims.

Wolf v. Banco National de Mexico, N.D. Cal., 1982, 549 F. Supp. 841 at 843. The court then held that the deposits were securities, but did not further consider the second and third claims.

The judgment is a curious document. It reads, in full:

The matter having come before the Court on cross-motions for summary judgment, and the Court having determined that plaintiff R.J. Wolf is entitled to judgment as a matter of law,
IT IS ORDERED AND ADJUDGED that judgment be entered for plaintiff, the parties to bear their own costs.

It does not specify whether judgment is for Wolf on all three claims, or only the first. The opinion, however, makes it clear that the court "did not reach" those claims, i.e., the second and third. They are left wandering somewhere in limbo;



this in spite of the fact that the prayer is for the amount of principal lost, plus interest, plus ten million dollars "in punitive or exemplary damages for fraud." There is also a prayer for attorney's fees, although Wolf is himself an attorney and acting in pro per. The judgment does not award any damages or attorney's fees.

Because the court's judgment did not consider claims two and three, they remain live claims for relief. Therefore the judgment is a partial summary judgment, now reviewable as a final judgment under 28 U.S.C. §1291. See Chacon v. Babcock, 9 Cir., 1981, 640 F.2d 221, 222.

Moreover, a judgment is not final as to one entire claim under 28 U.S.C. §1291, or under F.R. Civ. P. 54(b) if it decides only liability and leaves open the question of relief. Liberty Mutual Insurance Co. v. Wetzel,



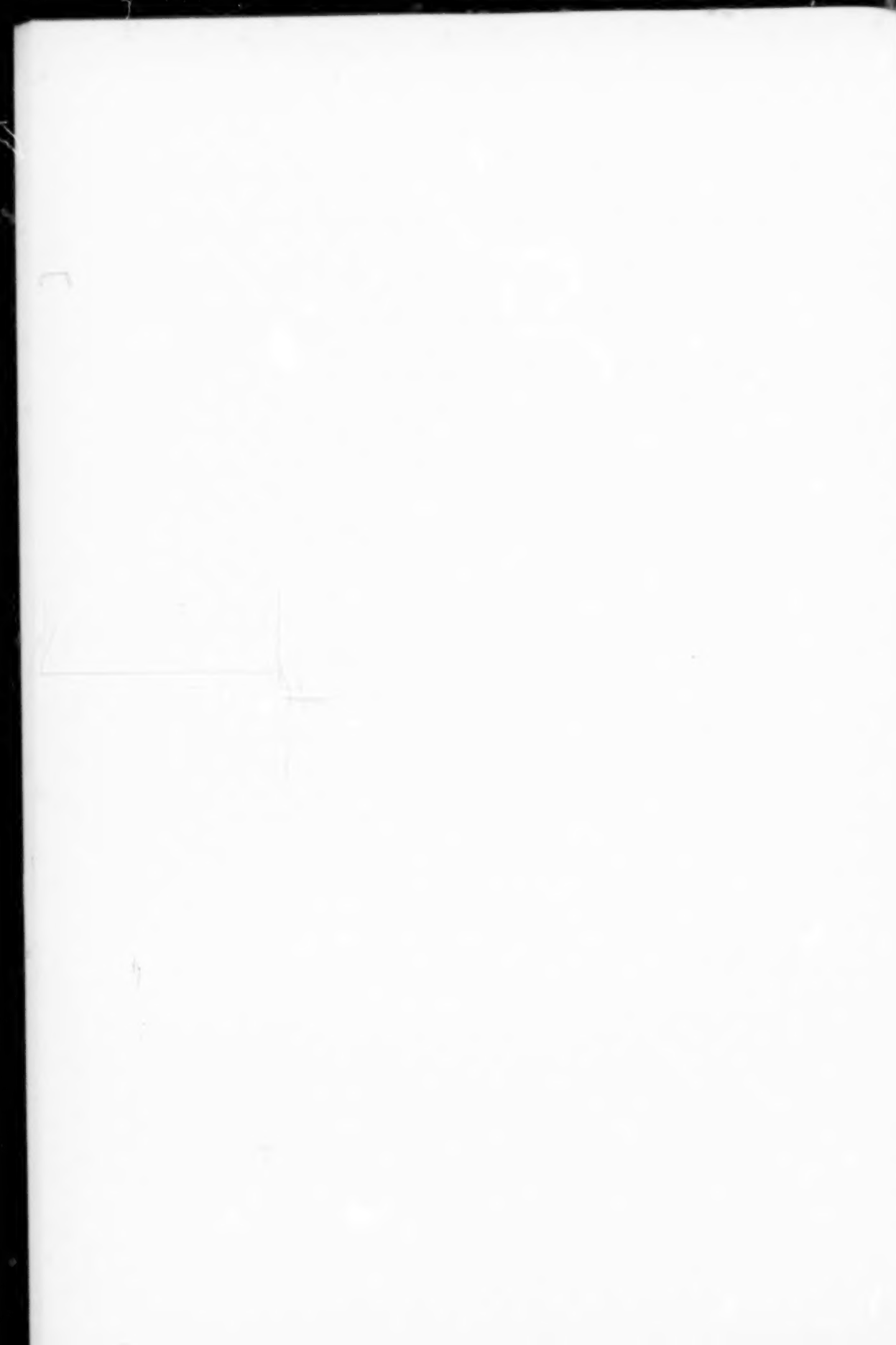
1976, 424 U.S. 737; Hain Pure Food Co. v. Sona Food Products Co., 9 Cir., 1980, 618 F.2d 521, 522; United States v. Southern Pacific Transportation Co., 9 Cir., 1976, 543 F.2d 676, 681 n.5.

There is no direction for entry of final judgment on the first claim, and no determination that there is no just reason for delay under F.R. Civ. P. 54(b). Even if there were, an appeal would not lie under Rule 54(b), because the judgment does not dispose of the entire first claim. There are no findings under 28 U.S.C. §1292(b).

The appeal is dismissed. If there is a later appeal from a final judgment under 28 U.S.C. §1291 or Rule 54(b), or an interlocutory appeal under 28 U.S.C. 1292(b), the appeal will be assigned to this panel. If in such an appeal the substantive issues



are the same as those presented in the
briefs in this appeal, the parties may
rely upon the briefs on file in this
appeal, and ask leave to supplement those
briefs if they wish to do so.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

R. J. WOLF, Plaintiff,

vs.

BANCO NACIONAL de MEXICO, S.A., Defendant.

C 82 1328 WWS

ORDER

January 12, 1984

This action is before the Court following remand by the court of appeals. The parties have made various motions which will be disposed of as stated below.

1. Defendant's motion to dismiss under the Foreign Sovereign Immunities Act of 1976 (FSIA) is denied. Plaintiff in this action does not complain of any action by the



Mexican government or defendant's compliance with governmental regulation. The gravamen of his complaint is that defendant sold unregistered securities and that it sold them by concealing material facts. Thus the action is based upon a commercial activity and falls within the exception in 28 U.S.C. §1605(a)(2).

Inasmuch as defendant advertised and promoted its accounts within the United States and dealt with plaintiff through the United States Postal Service, there is sufficient nexus for this Court to exercise jurisdiction.

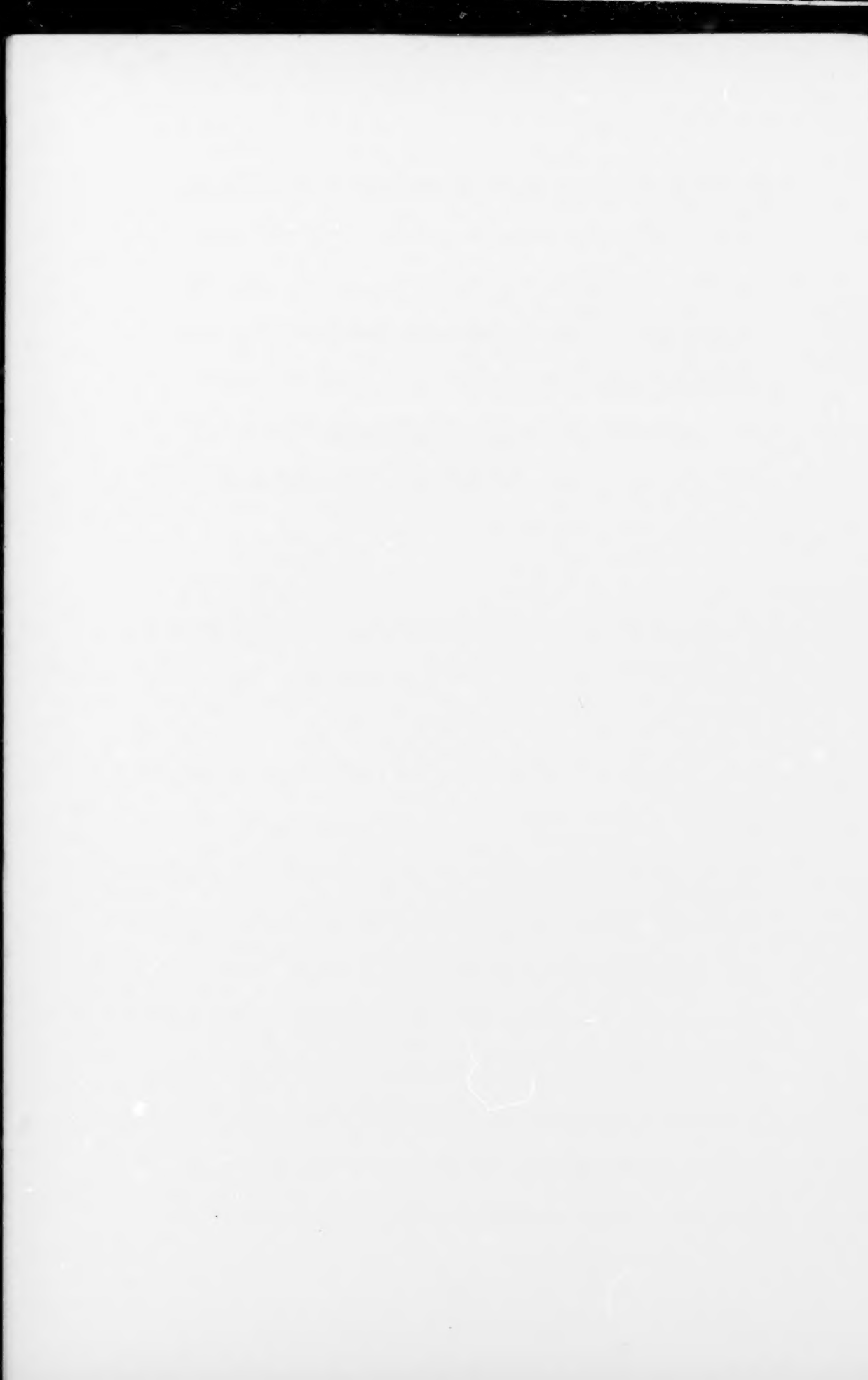
2. For the reasons stated in the preceding paragraph, defendant's motion based on the act of state doctrine is also denied.

3. Defendant's contention that plaintiff waived the protection of the securities laws

by executing a form document prepared by defendant the reverse side of which contained a clause in Spanish providing for litigation of disputes in Mexico has previously been rejected. On the merits of the contention, Wilko v. Swan, 346 U. S. 427 (1974), is controlling in the situation presented here.

4. In all other respects this and the related actions will remain stayed.

5. Defendant's motion to certify pursuant to 28 U.S.C. §1292(b) is granted. The issue whether the peso accounts are securities clearly involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of the litigation since reversal of this Court's order would end it. That issue being a pure question



of law ready for decision by the court of appeals, it appears to the Court to be a clear case for application of this section.

IT IS SO ORDERED.

DATED: January 11, 1984

WILLIAM W SCHWARZER
United States District Judge



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. J. WOLF, Plaintiff-Appellee,

vs.

BANCO NACIONAL de MEXICO, S.A.,
aka BANAMEX, Defendant-Appellant.

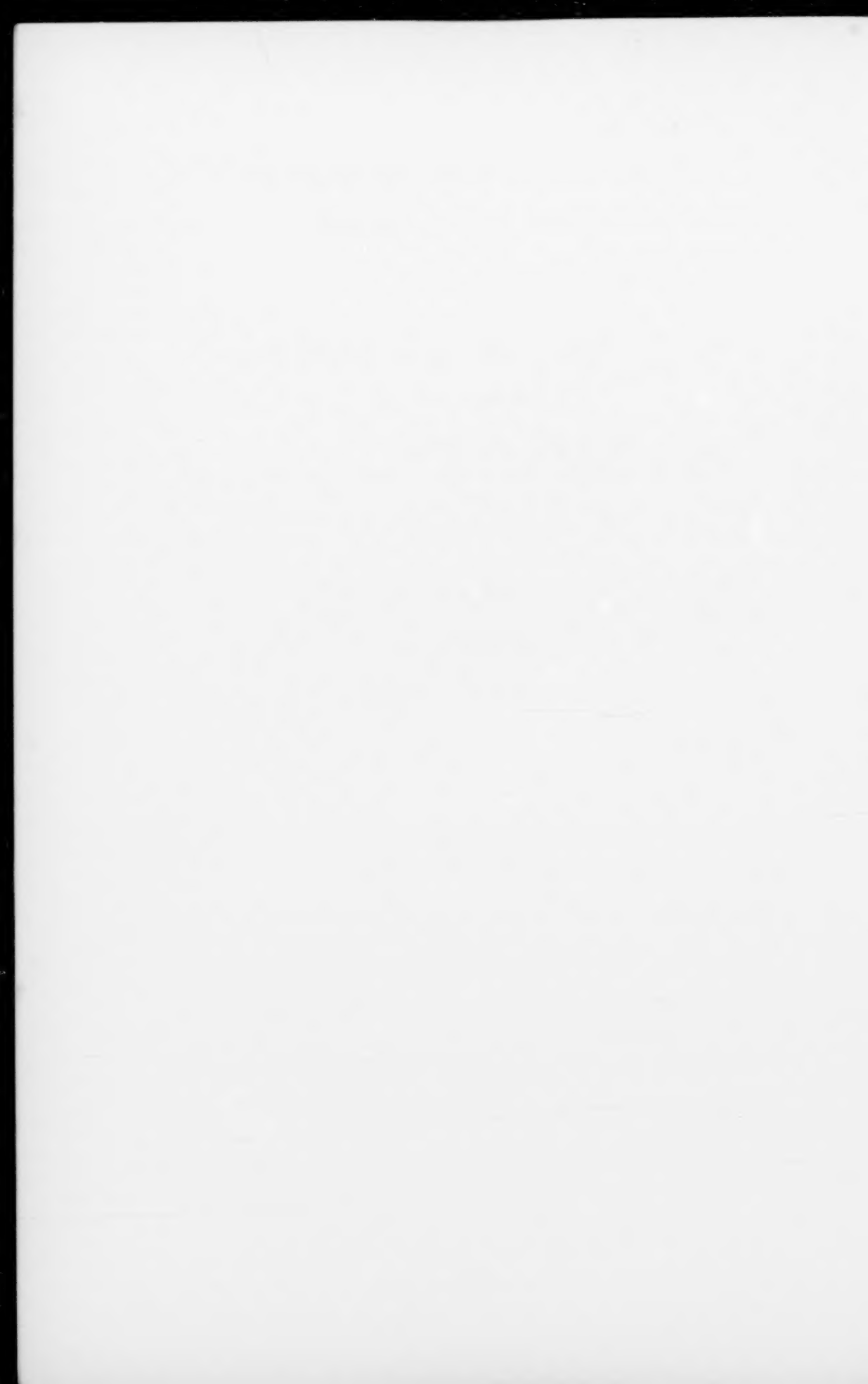
No. 84-8012

ORDER

February 27, 1984

Before: DUNIWAY, WALLACE and PREGERSON,
Circuit Judges

Banco Nacional de Mexico, S.A., has filed a petition for permission to appeal in this case, pursuant to 28 U.S.C. §1292(b). The petition is not opposed and appears to us to be in order. Accordingly, it is hereby ordered that permission to appeal is granted.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. J. WOLF, Plaintiff-Appellee,

vs.

BANCO NACIONAL de MEXICO, S.A.,
aka BANAMEX, Defendant-Appellant.

No. 84-1693

ORDER

October 18, 1984

Before: DUNIWAY, WALLACE, and PREGERSON,
Circuit Judges

The panel as constituted in the above case has voted to deny the petition for a rehearing. Judges Wallace and Pregerson have voted to reject the suggestion of a rehearing in banc. The full court has been advised of the suggestion of a rehearing in banc, and no judge of the court has



requested a vote on it. Fed. R. App. P.
35(b). The petition for rehearing is
denied, and the suggestion of a rehearing
in banc is rejected.

RESPECTFULLY SUBMITTED,

R J Wolf
Civic Center Box 4307
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(415) 485-0321

Petitioner and Counsel

EDITOR'S NOTE

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(4)
No. 84-678

Supreme Court, U.S.
FILED

DEC 3 1984

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1984

R. J. WOLF,
Petitioner,

VS.

BANCO NACIONAL DE MEXICO, S.A.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED*

In concluding that the peso-denominated certificates of deposit/time deposit accounts issued to petitioner by respondent Banco Nacional de Mexico, S.A. ("Banamex") in the ordinary course of banking business, repayment of which accounts was virtually guaranteed by Mexican banking regulations, were *not* securities within the meaning of the Securities Act of 1933, did the United States Court of Appeals for the Ninth Circuit:

1. Properly conclude that the test articulated by the Supreme Court in *Marine Bank v. Weaver*, 455 U.S. 551 (1982) governed this case;
2. Properly apply that test to the facts of this case; and
3. Even if the *Marine Bank* test does not govern this case, reach a result consistent with other applicable definitional tests.

PARTIES TO THE PROCEEDINGS

Petitioner R. J. Wolf and respondent Banco Nacional de Mexico, S.A. ("Banamex") are the only parties to these proceedings. The following entities appeared as *amici curiae* in the Ninth Circuit: Federal Deposit Insurance Corporation; Securities and Exchange Commission; Institute of Foreign Bankers; and Mexican Banking and Financial Institutions and Organismo de Coordinacion de la Banco Mexicana.

*These questions have been restated from those set forth in the Petition.

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No. 84-678

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

R. J. WOLF,

Petitioner,

VS.

BANCO NACIONAL DE MEXICO, S.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (opinion by Judge Duniway, unanimously joined by Judges Wallace and Pregerson) was rendered on review of an interlocutory order of the district court pursuant to 28 U.S.C. § 1292(b). While the Court of Appeals' decision disposes of petitioner's claims against Banamex under the federal securities laws, petitioner's claims for common law fraud and violation of California's state securities laws remain pending in the district court. As set forth in greater detail below, the Court of Appeals' decision rests on the straightforward

— and correct — application of this Court's prior decisions and the federal securities laws. As a result, and based on the additional confluence of factors set forth hereafter, the Court of Appeals' decision does not present the extraordinary circumstances which are required for review of a non-final, interlocutory judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On May 10, 1982, petitioner R. J. Wolf filed a complaint against Banco Nacional de Mexico, S.A. ("Banamex") in the United States District Court for the Northern District of California. The complaint alleged, among other things, that Banamex had violated the federal securities laws in connection with three Banamex time deposit accounts which he had opened in a Tijuana, Mexico branch of Banamex.

At the time petitioner made his deposits and at the time he brought the suit, Banamex was a private banking institution organized and incorporated (in 1884) under the laws of Mexico.¹ Banamex has had an uninterrupted history of trouble-free service to its customers throughout the world. It is one of the largest commercial banking institutions in Latin America, having more than 550 branches throughout Mexico and maintaining overseas agencies or offices in London, Madrid, Paris, Frankfurt, Tokyo, New York, and Los Angeles. As of December 31, 1981, Banamex was the 106th largest bank in the world, with assets over 17 billion U.S. dollars.

¹On September 1, 1982, Banamex and all other Mexican banks were nationalized. Pursuant to the Bank Nationalization Decree, Banamex became, and still remains, a wholly-owned agency or instrumentality of the Mexican government.

Petitioner is a California resident, licensed as an attorney to practice law before all courts in that State and in the State of Minnesota.

In the district court, petitioner claimed that sometime prior to August 1981 he read some unspecified advertising or article about Banamex in an unidentified newspaper or periodical. On August 5, 1981, petitioner sent a letter to Banamex's Tijuana, Mexico branch indicating that he was interested in opening an account with Banamex and requesting that Banamex send him information on such accounts. Thereafter, from Tijuana, Banamex sent petitioner the information he had requested, including a brochure entitled "Mexico's Other Great Climate . . . Investments."²

²The types of deposit accounts described in the brochure, which was written in English, included peso-denominated time deposits and dollar savings accounts. Peso time deposits carried the highest rate of return because of the risks involved in foreign currency exchanges. Petitioner's three time deposit accounts carried interest rates of 33.9%, 31.4% and 32.75%, respectively. Banamex's dollar savings accounts carried a much lower rate of interest. Petitioner selected the account with the highest rate of return — and assumed the greatest risk of foreign currency exchange fluctuation. The brochure also clearly stated that (a) the time deposit accounts were to be opened directly with a Banamex branch office in Mexico either in person or through the mail; (b) Banamex was indifferent as to which currency a depositor sent to them but that all currencies, other than pesos, had to be converted into pesos in order to be deposited in a peso account; (c) interest and principal payments were to be made payable in pesos, but Banamex would convert them into the currency of the depositor's choice at the prevailing exchange rates upon request; (d) interest and principal could be mailed directly to the depositor in either dollars or pesos at the depositor's request and (e) for the convenience of the depositor, Banamex would deposit interest as it accrued and principal upon maturity in a Banamex peso savings account or checking account, or it would convert the pesos into dollars and deposit them into a dollar savings or checking account if and only if the depositor desired such an arrangement. A foreign currency exchange was in no sense a part of the contractual arrangement which set the terms of the deposit.

On September 18, 1981, petitioner sent a \$20,000 check to Banamex's Tijuana branch to be converted by Banamex, as an accommodation to petitioner, into pesos and thereafter deposited *in pesos* in a six-month peso-denominated time deposit account (bearing 33.9% interest) to be maintained in Tijuana. Banamex honored petitioner's instructions, made the foreign currency exchange, opened the account for petitioner, and thereafter maintained the account, *all in Tijuana*.³ Further in accordance with his instructions, Banamex thereafter made monthly interest payments to petitioner on the account by taking the amount of monthly interest payable to him in pesos, converting that amount into dollars, and then mailing to him from Mexico the designated amount in dollars. The amount of the dollar payments fluctuated depending upon the currency exchange rate prevailing on the date of payment.

The foregoing procedures were also followed by petitioner and Banamex in connection with two later accounts. On November 16 and December 21, 1981, respectively, petitioner sent additional \$20,000 checks to Banamex's Tijuana branch to be converted by Banamex into pesos and then deposited in pesos in ninety-day peso-denominated time deposit accounts (bearing, respectively, 31.4% and 32.75% interest) to be maintained in Tijuana. As with his earlier account, Banamex fully honored petitioner's instructions with respect to each of these subsequent accounts.

For several years prior to petitioner's deposits, the Banco de Mexico, Mexico's central bank which is roughly

³By express contractual agreement signed by petitioner, his time deposit accounts were maintained in Mexico at the Tijuana branch of Banamex. The interest on these accounts was payable at Tijuana as it accrued on a monthly basis and the principal also was payable at the branch (*e.g.*, in Tijuana) upon expiration of the fixed term.

equivalent to the Federal Reserve Bank in the United States, had intervened in the Mexico money markets to maintain a stable value relationship between the United States dollar and the Mexican peso. On February 18, 1982, the Banco de Mexico without warning ceased its intervention, thus letting the peso float in relation to the dollar. The peso devalued sharply in relation to the dollar.

As a result of the devaluation, when petitioner's time deposit accounts matured and the principal of his deposited funds were, at his request, converted from pesos back into dollars and returned to him, he received less than the \$20,000 he had originally sent for deposit in pesos in each of the accounts. Petitioner's losses resulted entirely from the foreign currency exchange, and were totally unrelated to Banamex's handling or maintenance of the accounts, to the financial stability or solvency of Banamex, and to the adequacy of the Mexican bank regulatory system. The dollar sums returned to him were equal to the principal sums, *in pesos*, originally deposited by him into each account, plus whatever interest sums, *in pesos*, had not previously been converted into dollars and mailed to petitioner.

The courts below acknowledged that petitioner's transactions with Banamex were common banking, deposit-taking transactions, materially indistinguishable from those undertaken daily by U.S. domestic banks.⁴ The courts likewise expressly found that depositors in Mexican banks are afforded similar — and in many instances greater — protections than their counterparts in domestic banks.⁵ Finally, those courts expressly found that the

⁴549 F.Supp. at 842 (Appendix at 25-26); 739 F.2d at 1459, 1461 (Appendix at 4, 10-11).

⁵549 F.Supp. at 853 (Appendix at 58) ("In this case it is not contested that Mexico thoroughly regulates its banks. . ."); 739 F.2d at 1462 (Appendix at 15-16).

Mexican regulatory system has worked well and resulted in a stable and secure banking industry. Indeed, those courts expressly found that no Mexican bank has become insolvent or otherwise defaulted on its deposit obligations for the past 50 years.⁶

Petitioner was thus assured by Mexican law, as were all depositors in Mexican banks, that he would be guaranteed the return of his principal, plus interest, in pesos — the currency in which his accounts were denominated. This guarantee was *without dispute* fully satisfied by Banamex. Only the external economic factor of devaluation — a matter beyond the control of Banamex and of which petitioner was well aware⁷ — led to petitioner's "loss."

⁶549 F.Supp. at 853 (Appendix at 58) ("In this case it is not contested that . . . no Mexican bank has become insolvent in fifty years."); 739 F.2d at 1462 (Appendix at 15-16).

⁷Contrary to petitioner's intimations, the district court expressly did not make any finding that Banamex had in any way defrauded petitioner. Indeed, on the record, no such finding would be supportable. Adequate disclosure had been furnished from a number of sources. A highly publicized devaluation of the peso had taken place in 1976. The peso had declined steadily against the dollar in at least the six month period preceding the February 18, 1982 devaluation. Such information, including related stories discussing the risks of foreign currency loss attendant to opening peso accounts, were carried in most daily newspapers, including the *San Francisco Examiner*, a paper read regularly by petitioner. Moreover, petitioner was personally aware of the devaluation risk at least at the time of his last two deposits — in November and December 1981. In September, he was credited with 499,600 pesos for his \$20,000 check; in November 1981, 514,800 pesos for \$20,000; and in December 1981, 520,400 pesos for \$20,000. Despite the peso's steady, consistent decline in value relative to the dollar, petitioner nevertheless chose to assume the risk of further devaluation of the peso by opening two new peso accounts. Finally, in addition to the general media information available, in the brochure which Banamex sent to petitioner *at his request* (see note 2, *supra*), Banamex expressly informed petitioner that the peso was a floating currency, "which means that the rate of exchange between the peso and the currency you

ARGUMENT

I

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS AND THE STATUTORY FRAMEWORK APPLICABLE TO THE ISSUES IN DISPUTE.

A. The Ninth Circuit Correctly Applied The Test Enunciated In *Marine Bank v. Weaver* To The Facts In This Case.

The Ninth Circuit (by Judge Duniway, unanimously joined by Judges Wallace and Pregerson) performed a two-step analysis in concluding that Banamex's time deposit accounts were not securities: *First*, the court held that the "contextual analysis" test articulated by this Court in *Marine Bank v. Weaver*, 455 U.S. 551 (1982) applied with equal force to certificates of deposit/time deposit accounts issued by foreign banks. (Appendix at 15). *Second*, the court carefully examined the record below and concluded that Mexico's bank regulatory system "abundantly protected" Banamex's depositors against the risk of insolvency, thereby satisfying the *Weaver* test. (Appendix at 15-16).

As discussed hereafter, the Ninth Circuit's analysis — and conclusion — is supported not only by the reasoning of the Supreme Court in *Weaver*, but also by prior Supreme Court case law and the legislative framework governing securities and banking transactions. Likewise, the purported distinctions that petitioner now seeks to raise between the facts in this case and the facts in

request your interests [sic] and principal to be paid to you it could vary upwards or downwards between the time you purchase your Time Deposit and maturity."

Weaver are either contrary to the record below or immaterial to the *Weaver* test. The Ninth Circuit's decision, therefore, does not merit review by this Court.

In *Weaver*, this Court held that a six year, \$50,000 certificate of deposit issued by a United States bank was not a "security" under the antifraud provisions of the Securities Exchange Act of 1934 (the "1934 Act").⁸ The Court reaffirmed that the test for determining whether an instrument is a security "is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." *Id.* at 556 (quoting from *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 [1967]).

Applying this contextual analysis, the Supreme Court in *Weaver* rejected both of the reasons advanced by the Third Circuit for holding that the certificate of deposit before it was a security.⁹ The Court examined the contents of the certificate of deposit in question, the purposes it was intended to serve and the factual setting as a whole in holding that, in the context of a customary banking

⁸As the Ninth Circuit recognized, *Weaver* applies with equal force to the definition of "security" under § 2(1) of the Securities Act of 1933 (the "1933 Act"). (Appendix at 11-12).

⁹The Court first rejected the Third Circuit's reasoning that a certificate of deposit was analogous to withdrawable capital shares in a savings and loan association because, unlike such shares, the certificate paid a fixed rate of interest and the depositor did not share in any profits. 455 U.S. at 557. Thus, according to the Court, the bank issued certificate of deposit fell outside the scope of "the ordinary concept of a security." 455 U.S. at 557. The Court also rejected the second reason advanced by the Third Circuit — *to wit*, that, from an investor's point of view, a certificate of deposit is no different than any other long term debt obligation — on the ground that due to the comprehensive set of federal regulations which governed the issuing bank, "the purchaser of the certificate of deposit is virtually guaranteed payment in full." *Id.* at 558.

transaction involving a federally regulated bank, the bank certificate of deposit was not a security. The Court concluded (at 559) that:

It is unnecessary to subject issuers of bank certificates of deposit under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws.

The Ninth Circuit correctly concluded that the test articulated by this Court in *Weaver* applies to certificates of deposit issued by foreign banks. Both the specific holding and contextual analysis of *Weaver* support the Ninth Circuit's conclusion. Thus, if, as here, a foreign time deposit account contains provisions for payment of fixed interest and non-participation similar to those present in *Weaver*, the foreign time deposit account should not be found to be a security. Likewise, as long as the depositor is guaranteed repayment in full, as here, the source of the regulations that give rise to that guarantee should not matter. It is the overall effect of the government regulations and not their particular terms or their source which removes the risks that the securities laws were designed to protect against.¹⁰

¹⁰Thus, in *Weaver* the Court did not purport to limit its holding to certificates of deposit issued by federally regulated U.S. banks, but rather emphasized that "[e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." 455 U.S. at 560 n.11. In addition, the Court relied upon its holding in *Teamsters v. Daniel*, 439 U.S. 551 (1979) that the protection afforded members of noncontributory compulsory pension plans under ERISA removed any need for additional protection under the securities laws without undertaking a detailed comparison of the terms of the two acts. Similarly, in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 857 n.24 (1975), the Court held that New York State's regulation and oversight of the housing cooperative involved effectively removed any risk of insolvency without requiring equivalent federal protection.

And yet, petitioner claims that certain factual distinctions between this case and *Weaver* require a different result here — so-called factual distinctions expressly found against him in the courts below. In particular, he claims that the terms of Banamex's time deposit accounts differ in material respects from the account in *Weaver* and that the alleged presence of advertising and the solicitation of deposits in this case was absent in *Weaver*.¹¹ Petitioner is mistaken on both counts.

The certificate of deposit issued in *Weaver* and the time deposit accounts issued by Banamex in the present case do not differ in any material respects — a fact that both the district court and Ninth Circuit acknowledged. Indeed, the *only* significant difference in content and purpose between the instrument in *Weaver* and those issued by Banamex is the short term nature of the Banamex instruments (90 days to six months) as opposed to the long term nature of the instrument in *Weaver* (six years).¹² If anything, this factor indicates that the risk of

In each case, different regulations were found to already provide adequate protection against the risks which the securities acts address, so that extension of the federal securities laws would serve no general purpose. *Daniel*, 439 U.S. at 570.

¹¹Petition at 11, 20.

¹²The Banamex accounts share at least the following similarities with their domestic counterparts: (1) both deposits have a fixed term; (2) both deposits pay a fixed rate of interest for their entire term and the rate is fixed as of the date of the first deposit; (3) interest is paid monthly as it accrues without compounding; (4) upon maturity the principal is returned to the depositor; and (5) depositors have no voting rights or rights of profit participation. The "distinctions" that petitioner seeks to draw (Petition at 11) do not withstand scrutiny: (1) neither domestic nor foreign certificates of deposit give rise to special deposits over which the depositor exercises "dominion"; (2) domestic certificates of deposit can be either negotiable or non-negotiable; (3) this Court in *Weaver* clearly rejected the argument that pledging a certificate of deposit had anything to do with its status as a security, 455 U.S.

loss from insolvency was *less* in the present case than in *Weaver*.¹³

Moreover, even *assuming* advertising or solicitation of the magnitude that petitioner claims, such activities were certainly no greater than the widespread advertisements of domestic banks offering time deposit accounts at competitive rates of interest.¹⁴ Petitioner would convert customary banking, deposit transactions into the sale of a security simply because of allegations of such advertising. However, even in the face of allegations of direct, fraudulent solicitations by bank employees in *Weaver*,¹⁵ this Court refused to hold the certificate of deposit to be a security. It is inconceivable that the result in *Weaver* would have been different if the plaintiffs had alleged or proved that the bank engaged in widespread advertising — as Marine Bank undoubtedly did — to obtain deposits.¹⁶

at 559 n.9; and (4) there is no mandatory requirement that domestic banks allow early withdrawal of time deposits (except upon the death or incompetency of the owner), and the only penalties prescribed are minimum penalties. 12 C.F.R. § 217.4(e).

¹³Additionally, a comparison of the total deposits and assets of Banamex versus Marine Bank leads to such a conclusion. As of the end of 1981, Banamex had more than 13 billion U.S. dollars in deposits and more than 17 billion U.S. dollars in assets. *The Latin American Times*, p. 14 (Aug. 1982). By contrast, Marine Bank had only approximately 383 million U.S. dollars in deposits and 447 million U.S. dollars in assets at the end of 1980. *Moody's Bank & Finance Manual*, Vol. I, p. 1814 (1982).

¹⁴Indeed, on the record below, petitioner can hardly contend that Banamex's purported advertising and solicitation equal that of domestic banks.

¹⁵455 U.S. at 553; *see also, Weaver v. Marine Bank*, 637 F.2d 157, 160 (3d Cir. 1980).

¹⁶Similarly, it is immaterial whether Banamex's time deposit accounts were described as "investments" in the brochure provided to petitioner.

Perhaps recognizing that any attempt to create material factual distinctions in the bank accounts justifying a different result here than in *Weaver* must fail, petitioner next contests the adequacy of Mexico's banking regulations. The Supreme Court is thus asked to undertake another *fact finding* task that has already been performed by the courts below and resulted in a conclusion contrary to petitioner's position.¹⁷ Such fact finding is certainly not one worthy of this Court's review.

Clearly, not all "investments" are securities; an insurance policy, for example, may be advertised and sold as a good investment, but it is still an insurance policy for purposes of the federal securities laws. Numerous decisions by this Court and, in particular, *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 850 (1975), hold that the label given to an instrument is not dispositive.

¹⁷The Ninth Circuit found that the Mexican banking regulatory scheme is just as comprehensive as, and in many areas more protective than, the U.S. federal system. 739 F.2d at 1463 (Appendix at 22-24). See generally, United Mexican States, General Law of Credit Institutions and Auxiliary Organizations (1982) ("Credit Law"), Articles 2, 8 and 11. Deposits in Mexican banks are protected by reserve requirements which cover 100% of the bank's paid-in capital and up to 50% of the bank's liabilities, including deposits. *Id.* Articles 8, 94. By contrast, a federally chartered bank in the United States need maintain reserves of only 3% against time deposits of less than thirty months. 12 U.S.C. § 461; 12 C.F.R. § 204. Mexican banks, just like domestic banks, are required to make regular reports to government agencies, although Mexican banks must publish their financial statements on a monthly basis (Credit Law, Article 95) rather than the quarterly statements required under United States regulations. 12 U.S.C. §§ 161, 324, 1817. Both Mexican and domestic banks are subject to government inspection (Credit Law, Article 95; 12 U.S.C. §§ 481, 483, 1820(b)), and both regulatory systems control the advertising by banks with respect to their deposit contracts. Credit Law, Article 93; 12 C.F.R. §§ 217.6, 329.8. The Mexican banking regulations concerning reserve, reporting, inspection and advertising controls provide the functional equivalents of federal regulations in each instance.

Petitioner nevertheless argues that Mexico's banking regulations did not provide insurance coverage for certificates of deposit similar to that provided by the FDIC, thereby creating a "material" distinction from *Weaver*. However, the existence of FDIC insurance was only *one* of the factors considered by this Court in *Weaver* in assessing the historical record of protection afforded by government regulations to depositors in failing banks.¹⁸ The decision in *Weaver* nowhere suggests that, notwithstanding all the other federal regulations which govern domestic banking operations, the FDIC's insurance limits provide the *only* guarantee against insolvency. To the contrary, the Court expressly noted the existence of a strong government policy in favor of protecting depositors by even paying for the portions of their deposits above the amount insured. 455 U.S. at 558.¹⁹

¹⁸If deposit insurance had been a prerequisite for finding repayment of a certificate of deposit to be "virtually guaranteed" in *Weaver*, then, following petitioner's analysis, a certificate of deposit for \$100,000 issued by a domestic bank would *not* be a security because the deposit is fully insured, whereas a certificate of deposit for \$2,000,000 issued by the same bank would be a security because only 5% of that deposit would be insured. See 12 U.S.C. § 1821(a)(1). Since FDIC insurance insures a depositor up to a maximum of \$100,000 on each deposit, thus, a deposit of \$100,000 or under is fully insured against the bank's insolvency, while a \$2,000,000 deposit would be protected only up to 5% of that amount. This Court did not concern itself about this point in *Weaver*, even though at the time that suit was brought therein only 80% of the deposit at issue was subject to FDIC insurance.

¹⁹Mexico has the same policy, and has been just as — if not more — effective in implementing that policy. Indeed, the comprehensive regulation and oversight of Mexico's banking industry had historically provided *greater* protection against bank failure than FDIC insurance has provided in the United States. Although no Mexican bank has become insolvent in fifty years (Appendix at 16), by contrast, 722 United States banks failed in the period from 1934 to 1981, 136 of which were not insured by the FDIC. See 1981 Annual Report, Federal Deposit Insurance Corporation, Vol. I, p. 70.

Finally, petitioner argues that the Mexican regulatory system is *per se* inadequate because it furnishes no guarantee against the risk of currency devaluation sustained by him. This argument ignores at least two material, undisputed facts:²⁰ *first*, the same risk existed in connection with the certificate issued in *Weaver* and is inherent when any person owns a deposit account in a currency different from that in which he normally deals; and, *second*, the same devaluation risk is not covered or protected against by U.S. federal regulations. Both of these facts were properly recognized by the Ninth Circuit in its decision.²¹ Moreover, as in the present case, foreign currency exchange fluctuations result from a complex confluence of factors, all of which are influenced as much by economic conditions external to the foreign country as those which are internal. To hold an individual issuer, such as Banamex, responsible under the securities laws for the result of external economic factors and governmental acts beyond its control would be improper.

External economic risks — such as inflation, currency fluctuations or governmental intervention — have never been considered by this Court as appropriate criteria for determining whether an instrument is a “security.” Such risks are inherent in all transactions. Thus, the Court in *Weaver* did not inquire whether each dollar to be received by the Weavers in 1984 would be less valuable — due to inflation, devaluation, or otherwise — than each dollar they deposited in 1978.²² Such risks were wholly outside

²⁰It likewise ignores the fact that, in *Weaver*, the Court emphasized that “Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.” 455 U.S. at 556.

²¹739 F.2d at 1462 (Appendix at 17).

²²While the effect of devaluation on this Court’s analysis in *Weaver* must rest on hypothetical examples, the effect of inflation can be calculated exactly. The 6-year certificate of deposit in *Weaver* was

the control of Marine Bank and their consideration would have done nothing to advance the Court's contextual analysis.²³

In sum, the distinctions which petitioner seeks to draw between the present action and *Weaver* do not withstand scrutiny. As in *Weaver*, (a) the subject transactions arose in the commercial context of banking, (b) the transactions were regulated by an extensive and thorough banking regulatory system, and (c) these factors "virtually guaranteed payment in full" to petitioner. 455 U.S. at 558. Whether applying the specific holding of *Weaver* (that bank certificates of deposit are not securities) or its contextual analysis test, there is no conflict with *Weaver* present in this case that would warrant a granting of the petition.

B. The Ninth Circuit's Decision Is Not Only Fully Consistent With And A Proper Application Of *Weaver*, But It Is Also Consistent With The Statutory Framework Applicable to the Issues in Dispute.

Petitioner argues that the Ninth Circuit's decision is at odds with the Securities Act of 1933 (and its purposes) (the "1933 Act") as well as the International Banking

issued in 1978 and paid interest at the rate of 7½ % per annum. Inflation averaged 10.9% per annum from 1978 through 1981 (Economic Report of the President, February 1983 at 225), so that the value of the Weavers' deposit actually diminished, even after interest is taken into account. This Court never suggested in *Weaver* that the absence of federal regulations to guarantee against losses due to inflation was material to the security status of the certificate of deposit in issue.

²³Other courts have also recognized that the risk of devaluation in the unit of payment is not an appropriate criteria for evaluating the nature of an instrument as a "security." See, e.g., *Noa v. Key Futures, Inc.*, 638 F.2d 77, 79-80 (9th Cir. 1980); *Berman v. Dean Witter & Co.*, 353 F.Supp. 669, 671 (C.D. Cal. 1973).

Act of 1978 ("IBA"). Again, petitioner is mistaken in his analysis.

The legislative history behind the 1933 Act clearly reflects an intent to recognize and codify the difference between a transaction in securities and ordinary banking activities.²⁴ When President Roosevelt sent to Congress the bill that was later to become the 1933 Act, he expressed his view that bank regulation would be embodied in separate regulation. 77 Cong. Rec. 937 (1933).²⁵ Indeed, a major purpose of the Banking Act of 1933, ch. 89, 48 Stat. 162 ("Glass-Steagall Act") was to divorce the banking and securities businesses.²⁶ Congress clearly

²⁴Contrary to petitioner's assertion at page 25 of his Petition, the statutory exemption of domestic bank *securities* from the registration provisions of the 1933 Act in no way represents a congressional intent to distinguish between domestic and foreign *bank deposits*. Rather, it evidences the contemporary attitudes concerning the difference between securities and banking transactions, and congressional recognition that the sale of domestic banks' *stock* would be regulated under a separate federal banking act. See note 28, *infra*.

²⁵This Court has recognized such a distinction between banking and securities transactions on numerous occasions. *E.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-195 (1976).

²⁶*Federal Reserve System v. Investment Co. Trust*, 450 U.S. 46, 61 (1981). Section 16 of the Glass-Steagall Act allows a national bank to exercise "all such incidental powers as shall be necessary to carry on the business of banking", including "receiving deposits", but it also provides that "the business of dealing in securities and stock by the association . . . [shall be] in no case for its own account." 12 U.S.C. § 24. Conversely, § 21 of the Glass-Steagall Act prohibits securities firms from engaging in the business "of receiving deposits subject . . . to repayment upon presentation of a . . . certificate of deposit."

intended to draw a line with the issuance of certificates of deposit on the one side and the sale of securities on the other side.²⁷ Congress could not have drawn the line in this fashion if certificates of deposit issued in the normal course of banking business were securities.²⁸

Congress also maintained this distinction in its recent amendments to the definitions of "security" under the federal securities acts. In October 1982, the definition of "security" in the 1933 and 1934 Acts was amended by Congress to include "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof)." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). The juxtaposition of the words "security" and "certificate of deposit" in the amended definition was prompted by the holding in *Weaver*.²⁹ Significantly, although Congress juxtaposed the words "security" and "certificate of deposit" in the amended definitions under the 1933 and 1934 Acts, Congress also accommodated the SEC's historical interpretation of security under § 2(a)(36) of the Investment Company Act of 1940 by defining "security" in relevant part thereunder to read

²⁷*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976). This Court also noted in *Radzanower* that, "[w]hile Congress did examine problems stemming from the relationship of banks and the securities business in the early 1930's . . . it dealt with those problems in comprehensive legislation dealing only with banks." 426 U.S. at 155. n. 11.

²⁸The legislative history concerning the exemption of domestic bank securities from the registration provisions of the 1933 Act clearly indicates that in exempting bank securities, Congress was concerned only with capital stock issued by banks, not certificates of deposit. See Hearings on H.R. 4314 before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. at 31 (1933).

²⁹H.R. Rep. No. 97-626, Part I, 97th Cong., 2d Sess. 10 (1982).

"... option ... on any security (including a certificate of deposit)." ³⁰

None of these statutory amendments distinguishes between U.S. and foreign bank certificates of deposit. This is consistent with both the general banking and securities legislative framework discussed above and with the IBA. 12 U.S.C. §§ 3101-3107. In the IBA, Congress recognized that the U.S. banking system does not operate in a vacuum unaffected by international banking, isolated from banks in other parts of the world. Indeed, the legislative history reveals an intent to encourage "free and open international banking":

Free and open international banking enhances international trade and fosters democratic principles by providing for open and competitive markets. American banks abroad can and should play a significant role in supporting American Exports. ³¹

At a minimum, the position advanced by petitioner herein would, if approved by this Court, disrupt the "free and open international banking" envisioned by Congress and would result in invidious discrimination against foreign banks not in keeping with the legislative mandate in the IBA or the judicial mandate of *Weaver*. ³²

³⁰15 U.S.C. § 80a-2a(36), as amended by Pub. L. 97-303, 96 Stat. 1409 (1982). Banks and similar institutions are expressly excluded from the scope of the Investment Company Act. 15 U.S.C. § 80a-3(c)(3).

³¹S. Rep. No. 1073, 95th Cong., 2d Sess. 18 (1978).

³²The IBA provides for the operation of "federal" agencies or offices by foreign banks and was intended to provide foreign banks with "national treatment" under which "foreign enterprises ... are treated as competitive equals with their domestic counterparts." 1978 Sen. Rep. No. 1073, 95th Cong., 2d Sess. 2 (1978). The House Report contains the following discussion relating to foreign banks' securities activities:

Both H.R. 7325 and the bill adopted by the subcommittee, H.R. 10899, required that, after 1985, foreign banks with banking

C. The Ninth Circuit's Decision Is Fully Consistent With The Results Mandated Under Other Traditionally Applied Supreme Court Decisions.

The Ninth Circuit properly applied the *Weaver* test in the pending case. Even assuming *arguendo*, however, that another test should instead be applied, the result in this case would be the same. For example, in determining whether the context of a given transaction and the nature of a given instrument warrant application of the securities laws, courts have often applied the standard articulated by the Supreme Court in *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293 (1946).³³ Application of the *Howey* test to the present case fully supports the conclusion reached by the Ninth Circuit on the basis of *Weaver*. Banamex's time deposit accounts are not securities — such customary bank deposit transactions do not involve an investment of money in a common enterprise with the expectation of profits resulting from the managerial efforts of others. Indeed, in factual contexts indistinguishable from those in the present case, the courts in *Canadian Imperial Bank*

operations limit the business of their securities affiliates to activities related to the sale and distribution of securities outside the United States.

H.R. Rep. No. 910, 95th Cong., 2d Sess. 10 (1978). See 12 U.S.C. § 3106(c). If Congress had viewed the acceptance of foreign currency deposits by foreign banks as involving the sale and distribution of securities, this statement would be a contradiction. Congress would not pass a bill regulating the acceptance of deposits in the U.S. by foreign banks, yet at the same time exclude activities relating to the sale and distribution of securities if it considered such deposits to be securities.

³³This test has most frequently been characterized as a four-part test: (a) investment in (b) a common enterprise with (c) an expectation of profits (d) primarily through the efforts of a third party. *Id.* at 299. In *United Housing Foundation, Inc. v. Forman*, *supra*, the Court acknowledged that the *Howey* "test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security." 421 U.S. at 852.

of *Commerce v. Fingland*, 615 F.2d 465, 469-70 (7th Cir. 1980) and *Hendrickson v. Buchbinder*, 465 F.Supp. 1250, 1252 (S.D. Fla. 1979) applied the *Howey* test and concluded that accounts in foreign banks similar to those involved herein were not securities.³⁴

II

THE NINTH CIRCUIT DECISION IS CONSISTENT WITH AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner seeks to create conflicts between the Ninth Circuit's decision and decisions by other circuit courts where no conflicts exist. This is the *first* circuit court decision to apply *Weaver* in the context of a foreign bank

³⁴Numerous other lower courts have also reached the same conclusion with respect to accounts issued by domestic banks through application of the *Howey* test. See *Bellah v. First National Bank of Hereford, Texas*, 495 F.2d 1109, 1114-15 (5th Cir. 1974) (a bank certificate of deposit issued in exchange for currency is not a security because currency is not a security and because a bank certificate of deposit has none of the investment characteristics necessary under the *Howey* test); *Burrus, Cootes and Burrus v. MacKethan*, 537 F.2d 1262, 1264-65 (4th Cir.), *on reh'g sub nom.* 545 F.2d 1388 (1976), *cert denied* 434 U.S. 826 (1977) (domestic bank issued certificate of deposit held not to be a security because it is a commercial rather than investment transaction); *Ayala v. Jamaica Savings Bank*, 1981 CCH Fed. Sec. L. Rptr. ¶98,041 (E.D. N.Y.); *Hamblett v. Board of Savings & Loan Associations, etc.*, 472 F.Supp. 158, 166 (N.D. Miss. 1979). Nevertheless, citing *Tcherepnin v. Knight*, 389 U.S. 332 (1962), petitioner argues that unless an instrument offered as an "investment" is expressly exempted from the security laws it is a security. (Petition at 20.) Not only is this not the holding in *Tcherepnin* (*see, e.g.*, 389 U.S. at 336), but this Court also clearly rejected such literal interpretations of the securities definitions by emphasizing the need to examine the context in which the transaction occurs in *Weaver*. 455 U.S. at 556. See also, *United Housing Foundation, Inc. v. Forman*, 421 U.S. at 852.

or, indeed, in any banking context.³⁵ Thus, *Weaver* has not yet had a full opportunity to “percolate” through the district and circuit court levels. It would be an unwise utilization of this Court’s precious time to review the first circuit court decision applying *Weaver* — especially where there is no demonstration that the Ninth Circuit analysis *and conclusion* will not be followed elsewhere. Indeed, the decision below is fully consistent with, and supported by, prior circuit court decisions.³⁶

Petitioner’s only hope for the demonstration of a circuit conflict rests in his strained reading of the Fifth Circuit decision in *Meason v. Bank of Miami*, 652 F.2d 542 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982) — a pre-*Weaver* decision.³⁷ There, the court applied a

³⁵The Third Circuit considered what effect, if any, this Court’s decision in *Weaver* would have on its decision that the sale of all or part of a business effected by the transfer of stock is a sale of a security under the Securities Acts in *Ruefenacht v. O’Halloran*, 737 F.2d 320, (3rd Cir. 1984). In dictum, the circuit court explained that *Weaver* had applied a two-part analysis paralleled to that performed in *Forman*, first ascertaining whether the certificate of deposit was a “note” or “withdrawable capital share” and only then turning to whether the separate agreement was an “investment contract” under the *Howey* test. 737 F.2d at 338.

³⁶As discussed above, in a pre-*Weaver* decision, the Seventh Circuit in *Canadian Imperial Bank of Commerce v. Fingland*, *supra*, applied the *Howey* test in holding “that certificates of deposit issued by a Bahamian bank were not securities.”

³⁷*Securities & Exch. Com’n v. First American Bank & T. Co.*, 481 F.2d 673, 678 (8th Cir. 1973), relied on by petitioner (Petition at 24), contains no discussion of the nature of the “passbook savings accounts” which the court lumps together with “capital notes” and “certificates of investment” that were offered by the defendant trust company, which company was not even a “banking institution” under the applicable state law. Obviously, this case is not authority for the proposition that certificates of deposit issued by a bona fide bank in the normal course of its banking operations are securities.

"commercial-investment" variant of the *Howey* test in holding that a plaintiff's *allegations* that certificates of deposit issued by a Grand Cayman Island "shell" bank were securities were not wholly insubstantial or frivolous. 652 F.2d at 546.

But, clearly, the result in *Meason* would have been the same if the Ninth Circuit test here before the Court had been applied by the Fifth Circuit. The facts in *Meason* indicate that the issuing Grand Cayman "bank" was a "shell" (rather than a *bona fide*, internationally recognized bank); it was inadequately capitalized and engaged in speculative lending practices (presenting a clear risk of insolvency); and the government regulations in effect were inadequate (indeed, non-existent). 652 F.2d at 544-45.³⁸ Under the *Weaver* test as applied by the Ninth Circuit below, therefore, the unusual circumstances present in *Meason* would have mandated that the time deposits in that case were securities requiring the protection of U.S. securities laws.

³⁸Some nations, such as the Grand Cayman Islands, maintain a dual banking system, which permits one class of banks to conduct full banking operations within the nation, but which limits another class of banks to only offshore deposits and business. Under the Grand Cayman banking scheme, a bank with a "Class A" license may conduct business within the Cayman Islands. A bank with a "Class B" license, on the other hand may maintain an office in the Islands but must conduct all of its business outside of the Islands. Banks and Trust Companies Regulations Law, § 4(8). Furthermore, a Class B licensee may choose between having an unrestricted license or a restricted license, which requires a much lower minimum paid up capital. At the time of its organization, a Class B restricted licensee must provide a name of all of those companies and people from which it will solicit or receive funds. The Banks and Trust Companies Regulations 1968, Schedule, Part II, § 8. The "bank" in *Meason* was a "Class B" bank. Mexico has no such dual system, and Banamex in any event can hardly be deemed a "shell."

III

THE FACTUAL CONTEXT OF THIS CASE SUPPORTS THE CONCLUSION REACHED BY THE NINTH CIRCUIT AND DOES NOT JUSTIFY REVIEW BY THIS COURT.

Two additional material factors contribute to — indeed mandate — the conclusion that this case is not a proper one for Supreme Court review. *First*, before the Ninth Circuit, each of the *amicus* parties — including the Securities and Exchange Commission (“SEC”), Federal Deposit Insurance Corporation (“FDIC”), Institute of Foreign Bankers, and an Organization of Mexican Banking and Financial Institutions — urged reversal of the district court opinion and *articulated a position that petitioner was not entitled to any recovery under the 1933 Act because, at the least, he did not suffer any recoverable damage under that law. E.g., SEC Amicus Brief at 19. Second*, now that Banamex is a nationalized institution and, hence, a part of the Mexican government, this Court’s review and potential reversal of the Ninth Circuit decision could create significant adverse international repercussions, not only within the international banking community but also in the context of sensitive relations between the U.S. government and the government of the United Mexican States.

A. There Was Agreement Between the Parties Below, Except Petitioner, that He Was Entitled to No Recovery Under the 1933 Act.

In the court below, the SEC and FDIC, in *amicus* roles, differed on what definitional test the Ninth Circuit should have applied, but did *agree* on two material points: that the district court decision should be reversed³⁹ and that

³⁹Contrary to petitioner’s assertion at pages 33 and 34 of his Petition, the SEC did not take the unqualified position that foreign bank time deposit accounts were securities. The SEC conceded that the vast

petitioner did not suffer any recoverable damage under the 1933 Act. Thus, petitioner is, at best, asking this Court to undertake a theoretical, advisory task.⁴⁰ In such a case, where *all parties* below (except petitioner) agree that petitioner is entitled to the recovery of *nothing* on the facts of this case, it would be improper for the Supreme Court to grant certiorari.

B. A Consideration of the Present Status of Banamex as an Instrumentality of the Mexican Government Warrants Denial of the Petition.

Petitioner argues that the Ninth Circuit's decision will somehow require lower courts to violate the act of state doctrine and otherwise embroil them in matters sensitive to international relations. This argument demonstrates a fundamental misunderstanding of the nature of the act of state doctrine and of the inquiry which the Ninth Circuit undertook in applying the *Weaver* test. More significantly,

majority of time deposit accounts — even foreign bank time deposit accounts — are *not* securities:

[T]he context of the transactions in which such instruments [foreign bank time deposit accounts] are purchased will generally place them outside the scope of the registration and antifraud provisions.

SEC Amicus Brief at 13.

⁴⁰Petitioner also makes much of the fact that the Ninth Circuit failed to give proper deference to the SEC's construction of the 1933 Act and, instead, followed this Court's enunciated test in *Weaver* as urged by Banamex, the FDIC and each other *amicus* party. The Ninth Circuit was confronted by conflicting positions between the two governmental agencies perhaps most concerned with the common banking transactions at issue herein — and, based on *Weaver*, chose to follow the position articulated by the FDIC. In so doing, the court rejected the SEC argument against application of *Weaver* and its advocacy of an amorphous "commercial-investment" dichotomy test that would have furnished no guidance to reviewing courts and that ignored applicable factors articulated in *Weaver*.

and contrary to petitioner's contention that factors of international relations between governments mandate review by this court and reversal by it of the Ninth Circuit decision, those factors strongly militate against any such review of that decision by this Court.

The act of state doctrine provides that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge *the legality of a sovereign act* of a foreign state.⁴¹ Clearly, in assessing whether or not a foreign government's banking regulations provide adequate protection against nonpayment of time deposit accounts, a U.S. court would not be *adjudicating the legality* of any act by any foreign government.⁴²

This distinction between "adequacy" and "legality" is well-illustrated by the facts of the present case. Except for certain conclusory allegations of petitioner, no one has contested the efficacy of the Mexican bank regulatory system in virtually guaranteeing depositors against the risk of bank insolvency. Even the SEC conceded (at page 11 of its Amicus Brief below) that "Mexico's bank regulatory system is undoubtedly sophisticated and effective." Moreover, weighing evidence concerning foreign bank regulatory systems is no more difficult or sensitive than the well-established practice of assessing foreign *judicial* systems in order to determine if foreign judgments sought to be enforced in U.S. courts have been rendered

⁴¹*Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *see, also, Intern. Ass'n of Machinists, Etc. v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

⁴²The act of state doctrine is distinct from sovereign immunity, which goes to the jurisdiction of the courts. The act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, and there is no basis for arguing that banking transactions involving foreign states automatically raise act of state considerations. *Cf. Intern. Ass'n of Machinists, supra*, 649 F.2d at 1360.

in accordance with U.S. notions of due process.⁴³ Indeed, the SEC itself has weighed the adequacy of foreign systems in issuing no action positions under the federal securities laws.⁴⁴ Objective proof of the efficacy of foreign bank regulatory systems in protecting depositors against the risk of insolvency is generally available — as it indisputably is in this case — through a review of the system's historical record in protecting depositors against bank failures (as well as through evidence of the existence of conventional reserve, reporting, examination and similar procedures).

More importantly, rejection of the Ninth Circuit's analysis, and the corresponding rejection of the *Weaver* approach in the foreign bank context, leads to the far more substantial and adverse "sensitive" presumption that *no* foreign bank regulatory system adequately protects its depositors, and that therefore foreign banks can bring themselves within the *Weaver* test *only* by submitting to U.S. federal bank regulation through the opening of federally regulated branches in the U.S. Such an adverse presumption becomes even more disturbing in the present case in view of the fact that Banamex has been nationalized and is now an instrumentality or agency of a foreign government, the United Mexican States. An attempt to regulate Mexican banks by extending the coverage of U.S.

⁴³See, e.g., Cal. Code Civ. Proc. § 1713.4 (providing that the enforcement of a foreign judgment is not conclusive on California courts); *Mattos v. Correia*, 274 Cal.App.2d 413 (1969); *Burt v. Burt*, 187 Cal.App.2d 36 (1960). See also, *Hilton v. Guyot*, 159 U.S. 113 (1895); *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F.Supp. 737 (S.D. N.Y. 1979); Restatement (Second) of Foreign Relations Law of the United States: § 40 (1965); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968).

⁴⁴See, e.g., SEC No Action Letter, International H.R.S. Ind., Inc. (release date 4/16/84) (involving a reorganization to be approved by the Supreme Court of the Province of British Columbia).

securities laws would be an affront of the highest order to the integrity of the Mexican banking industry and its undisputedly effective, extensive regulatory system. The principles of comity would be unceremoniously rejected.⁴⁵

Adverse international repercussions would not only be felt in Mexico. Extending coverage of securities laws to foreign currency instruments such as the Banamex accounts could result in at least two additional adverse consequences. First, it would likely invite similar, potentially retaliatory treatment from the courts of foreign countries whose citizens have converted their own currencies to establish dollar deposits in U.S. banking institutions. In such circumstances, U.S. banks would be loathe to accept deposits from foreign sources, lest they establish themselves as guarantors of foreign currency fluctuations.

Second, and perhaps more importantly, such an extension could seriously jeopardize the provision of foreign banking services to U.S. persons, both corporate and individual. A deposit account is, itself, perhaps the most important banking service provided a customer, but it is also a necessary element to almost any other banking service available. Yet the effect of the position advanced

⁴⁵Not only would such an extension of the securities laws result in a rejection of comity and an affront to the Mexican government, but it would likewise negate the substantial efforts of the U.S. government in assisting Mexico in the restructuring of its foreign debt. Acceptance of petitioner's position could result in Banamex, and, hence, the Mexican government, being responsible for responding in damages to judgments entered on behalf of petitioner, and perhaps others similarly situated. The efforts of the U.S. government in restructuring Mexico's debt might have the anomalous result, therefore, of returning money, that was otherwise earmarked for use in Mexico for the repayment of Mexico's foreign debt, to the U.S. in the form of damages, compensating petitioner and others similarly situated for foreign currency exchange losses.

by petitioner would be to require foreign banks to register local currency deposit accounts with the SEC if they wish to continue making such accounts available to any U.S. persons. Failing such registration, foreign banks would subject themselves to becoming a guarantor of foreign exchange losses — as Banamex would become if petitioner's position were upheld — or to the risk of fraud actions under the U.S. securities laws for failure to disclose in writing before the opening of the deposit all significant risks of the country and the issuer. To avoid such risks, most foreign banks would choose not to register their deposits with the SEC and instead curtail their banking business with U.S. persons. Not only would the annual cost of registration be prohibitive for most banks, but the operational complications for assuring distribution of a prospectus to each potential U.S. depositor would be, in most instances, insurmountable.⁴⁶

The Ninth Circuit's decision represents the logical application of the *Weaver* test to foreign bank time deposit accounts. It fully protects U.S. depositors in such accounts; it is consistent with the history and purpose of the federal securities acts; and it involves no intrusion upon the acts of the foreign state.

⁴⁶For example, deposits are often established by wire on short notice and for maturities of one or two days by banks throughout the world in a variety of different currencies. Purchasers are engaged in banking transactions and, in making such deposits, rely on banking regulations and the customary practice of the banking industry. Provision of full disclosure prior to the establishment of such a deposit is not feasible, nor would such disclosure be of any significant interest to the depositors.

IV

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

DATED: November 28, 1984.

Respectfully submitted,

DAVID W. STEUBER

PAUL, HASTINGS, JANOFSKY &

WALKER

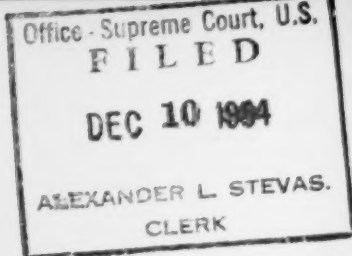
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NO. 84-678



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

R. J. WOLF, PETITIONER,

vs.

BANCO NACIONAL DE MEXICO, S.A., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

R. J. Wolf
Civic Center Box 4307
San Rafael, California 94903
(415) 485-0321

Petitioner and Counsel

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STATUTES

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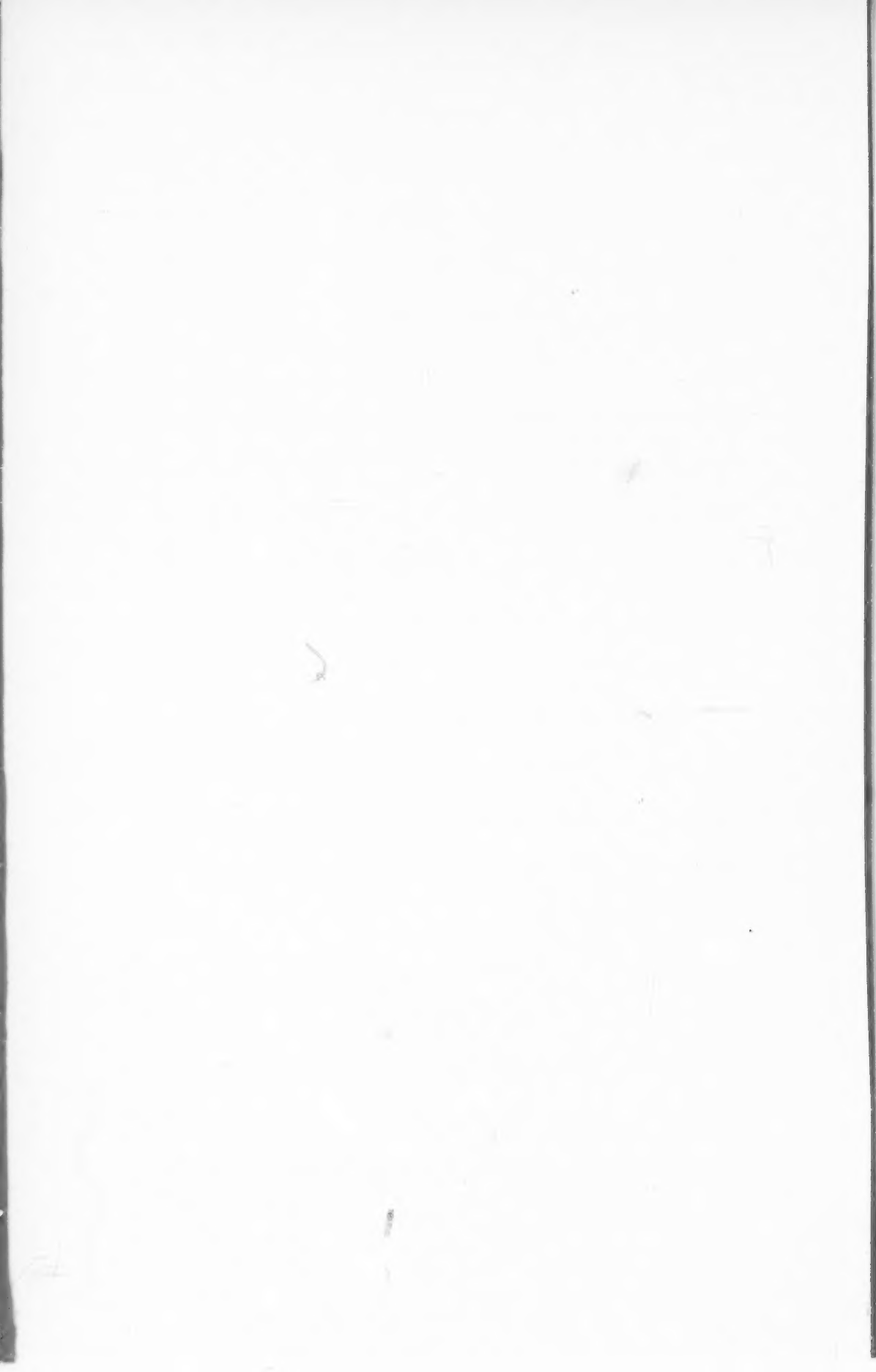
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ARGUMENT

Respondent's Brief in Opposition has raised first certain arguments to which this Reply is limited, and addressed.

Respondent asserts at page 6, note 7, under the guise of restating the case below, that no finding that Banamex defrauded Wolf would have been supportable on the record because information concerning the possible devaluation of the peso was available apart from the brochure that painted an entirely different and much rosier picture -- information Banamex itself produced below, of which it was obviously aware, and of which Wolf denied under oath he had ever heard. Moreover, Wolf specifically declared under oath he was absolutely unaware of the possible devaluation of the peso prior to any of his investments. The miniscule fluctuations in the rates of exchange beforehand



were normal, everyday occurrences in the money market that in no way portended the devaluation. And the Chairman of Banamex's Board of Directors was a member of the Advisory Board of the Banco de Mexico at and prior to the time the decision was made to withdraw its support of the peso. Thus, the record establishes without room for doubt that Banamex had at the very least constructive knowledge the peso would be devalued, and Wolf had no actual knowledge. Liability under Section 12(2) of the Securities Act of 1933, 15 U.S.C. §77 l(2), was proved. It provides,

Any person who ... offers or sells a security ... by the use ... of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise or reasonable care could not have known, of such untruth or omission, shall be liable ... for damages



Scienter on the part of Banamex was not required to establish this particular violation. Noting that securities fraud is "light years" away from common law fraud, Herman & MacLean v. Huddleston, 103 S.Ct. 683 (1983), said,

Liability against the issuer of a security is virtually absolute, even for innocent misstatements ...

A mere omission to tell Wolf all it knew about the possible devaluation of the peso was sufficient to establish Banamex's liability for damages.

Aaron v. SEC, 446 U.S. 680 (1980), in construing the identical language of Section 17(a)(2) of the Act, 15 U.S.C. §77 q(a)(2), also held scienter was not required. In discussing that section, Loss, III Securities Regulation, 1433, points out,

It is now quite clear that a half-truth is as bad as an outright lie ... Clause (2) of §17(a) of the Securities Act ... is specifically aimed at half-truths ...



and Tennyson's The Grandmother reminds,

That a lie which is half a truth is
ever the blackest of lies, That a
lie which is all a lie may be met
and fought with outright, But a lie
which is part a truth is a harder
matter to fight.

Of course the burden of proving it neither
knew, nor in the exercise of reasonable
care could have known, of the possibility
the peso would be devalued, belonged to
Banamex, 15 U.S.C. §77 1(2); Carrott v.
Shearson Hayden Stone, Inc., 724 F.2d 821
(CA9 1984), a burden it never met (and
could never meet) in light of the infor-
mation it had. And only actual knowledge
on the part of Wolf could defeat his re-
covery under that section. Bromber & Lo-
wenfels, 3 Securities Fraud, §8.4 (317);
Sanders v. John Nuveen & Co., 619 F.2d
1222 (CA7 1980); cert.den., 450 U.S. 1005.
As held in Hill York Corp. v. American
Int'l Franchises, Inc., 448 F.2d 680 (CA5
1971),

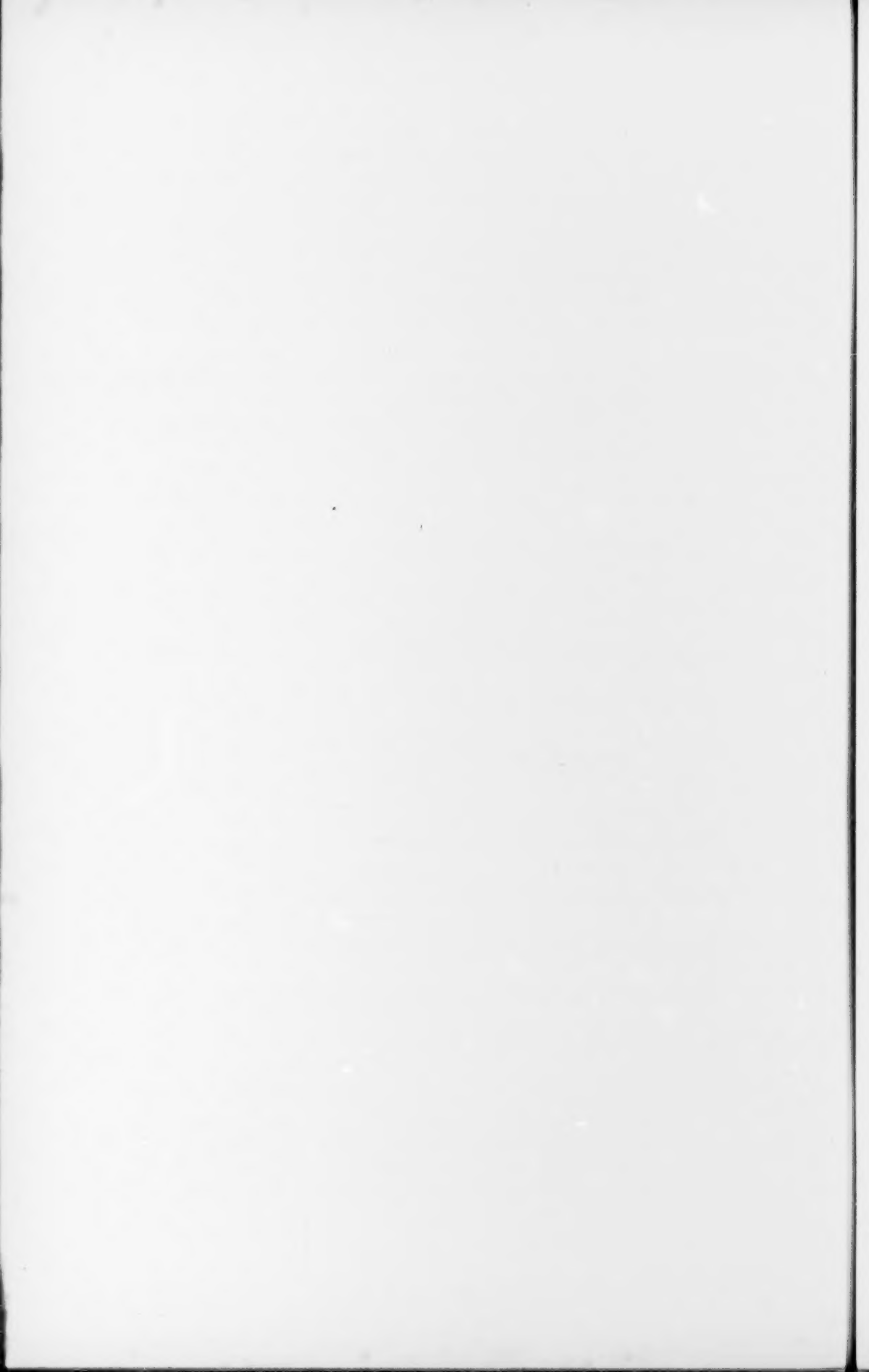


The defendants' argument concerning the availability of information to the plaintiffs is equally unavailing here. The plaintiffs do not have to prove that they could not have discovered the falsity upon reasonable investigation [cit.om.]. To put it simply, the availability of information elsewhere does not excuse misleading or incomplete statements [cit.om.]. Finally, the record contains abundant evidence supporting the fact that the plaintiffs were indeed ignorant of the untruths and omissions.

See also, Gilbert v. Nixon, 429 F.2d 348 (CA10 1970); Johns Hopkins University v. Hutton, 422 F.2d 1124 (CA4 1970); Spatz v. Borenstein, 513 F.Supp. 571 (E.D.Ill. 1981); In re Itel Securities Litigation, 89 F.R.D. 104 (N.D.Cal. 1981).

Essential though it was to clarify the record here and now, securities fraud per se formed no part of the decision of either court below and is therefore not before this Court.

The court does not reach these fraud claims. Both parties have moved for summary judgment on the dispositive issue of whether plaintiff's time deposits were securities. If the

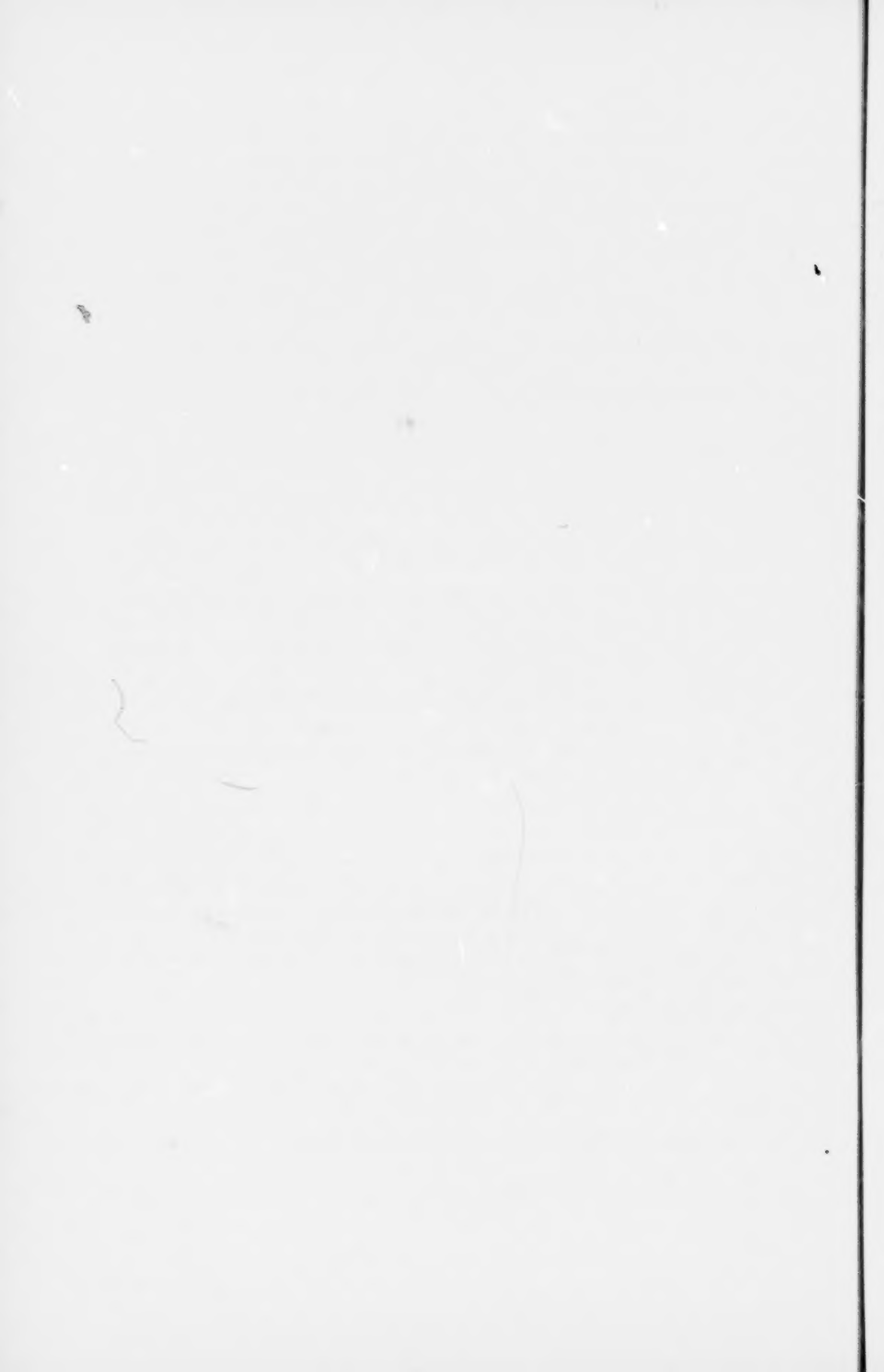


deposits were securities, then Banamex is strictly liable under the 1933 Act for failing to register them. If the deposits were not securities, then this Court has no jurisdiction over any of plaintiff's claims. (Pet.App. 28)

Although the district court proceeded to hold the time deposits were indeed securities, and that Banamex was strictly liable to Wolf as the statute provides, 15 U.S.C. §77 1(1), the amount of damages has not yet been decided because the pure, legal securities question was thereafter certified pursuant to 28 U.S.C. §1292(b),

The issue whether the peso accounts are securities clearly involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal may materially advance the ultimate termination of the litigation since reversal of this Court's order would end it. (Pet.App. 82)

Nor did damages form any part of the decision of the court of appeals. Yet Respondent's Brief in Opposition, at page 24, now asserts that petitioner suffered no



recoverable damages under the 1933 Act and is thus "asking this Court to undertake a theoretical, advisory task." Again, the record demonstrates, and each of the courts below found, that Wolf suffered a loss of principal in the amount of \$24,464. (Pet. 3; Pet.App. 5, 26). His complaint sought recovery of that, interest, punitive damages, "and such other relief, legal or equitable, as the Court may deem appropriate".

15 U.S.C. §77 l quite clearly provides that in the event of the sale of an unregistered security, the buyer is entitled "to recover the consideration paid for such security with interest thereon" or "damages if he no longer owns the security". In no way does the Act except or exclude any kind of loss from its coverage; rather, §77 p says,

The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

As Herman & MacLean v. Huddleston, supra,
declared in discussing that section,

the remedies in each Act were to
be supplemented by "any and all"
additional remedies.

To be sure, Wolf suffered, at least in
part, losses that were attributable to the
currency devaluation that occurred. But
those same losses were equally attributable
to Banamex's offer and sale of these fixed
term peso accounts in violation of the re-
gistration provisions of the Act. And of
course it was Banamex that benefitted by
the same \$24,464. it never returned to
Wolf. Disgorgement has long been an ad-
ditional remedy under the securities laws.
See, e.g., Nelson v. Serwold, 576 F.2d 1332
(CA9 1978), a 10b-5 case, but relevant,

... the recent trend looks to defen-
dant's profits, rather than to plain-
tiff's losses, in measuring damages
... To allow violators of the Act to
profit by their misconduct would un-
dermine the deterrence that the Act
was intended to effect.



Nor is there anything in the 1933 Act or elsewhere that precludes the recovery of currency devaluation losses, or, for that matter, any other appropriate award. Under another act, Silkwood v. Kerr-McGee Corp., 52 L.W. 4043 (January 11, 1984) declared,

... it is Kerr-McGee's burden to show that Congress intended to preclude such awards [cit.om.]. Yet, the company is unable to point to anything in the legislative history or in the regulations that indicates that punitive damages were not to be allowed.

Sanamex can point to nothing here either.

Currency devaluation losses have always been recognized for tax purposes, and allowed as deductions,

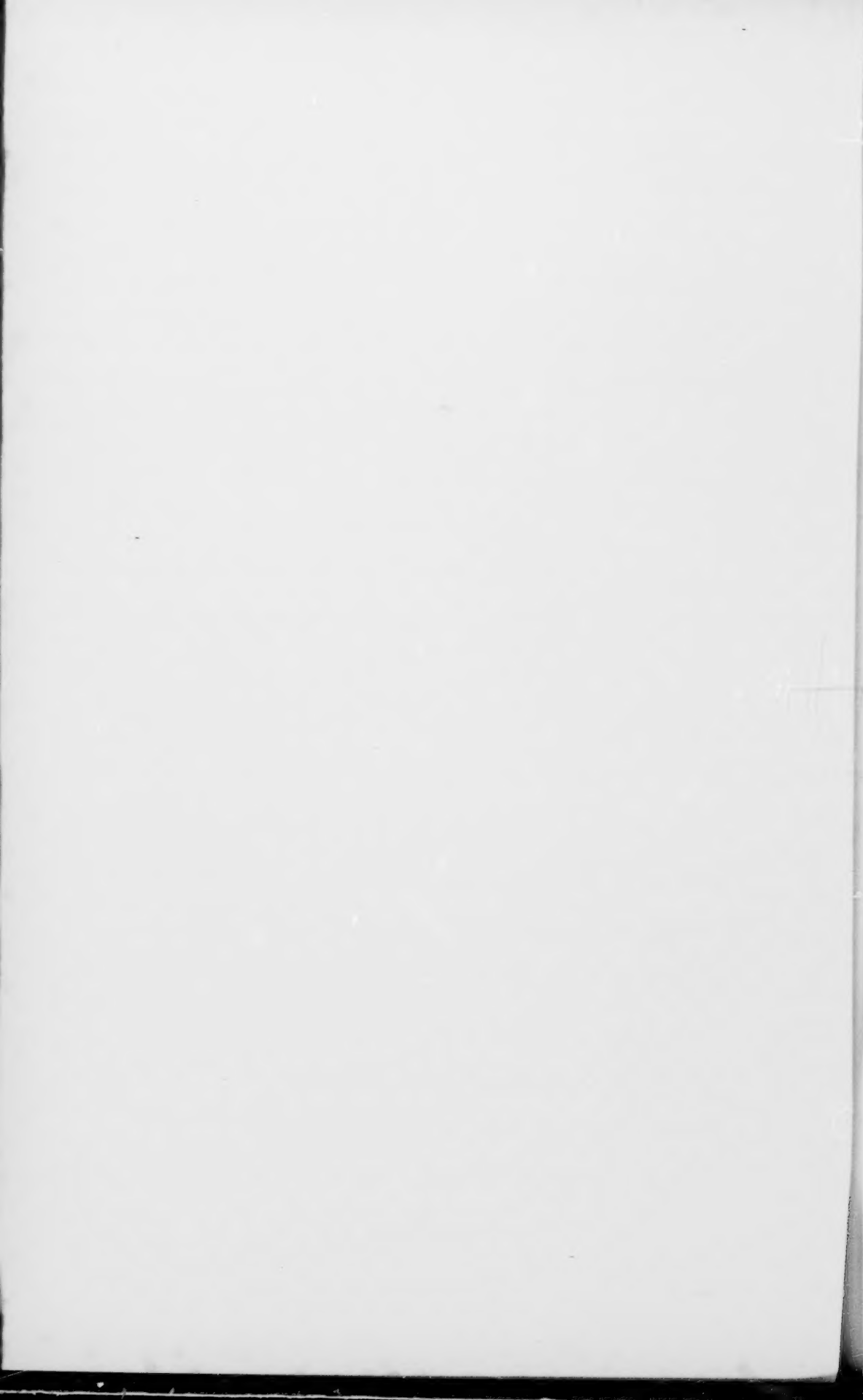
Foreign currency is treated like property or a commodity. Thus a taxpayer may have gains and losses from dealings in it. These gains and losses may result from official revaluation, day-to-day fluctuations in the rate of exchange, or other factors. For example, a taxpayer who buys foreign currency and then sells it after devaluation would have a deductible loss.

1983 Federal Tax Coordinator 2d, Vol. 10,

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¶ G-7011, p. 24,410, and cases and authorities cited therein. To the same effect see, Ltr. Rul. 7923009, Technical Advice Memorandum, 2/9/79; 5 Mertens Law of Federal Income Taxation, §28.82, and authorities therein.

Foreign currency devaluation losses must be recoverable under the Act if options and privileges relating to foreign currency are, and always have been, subject to the Act; see, 15 U.S.C. §77 b(1); 1982 U.S. Code Cong. & Adm. News, 2780-2789. Fluctuating value risks may -- or may not be -- outside the control of the issuer; nevertheless, it is protection against such risks that the Securities Act of 1933 was meant to provide. That is why the issuer's liability is virtually absolute, Herman & MacLean v. Huddleston, supra, and for reasons Congress has long deemed essential.



In its final attempt to defeat the petition Respondent's Brief in Opposition at page 27 has interjected another nonissue into this proceeding: the spectre of "adverse international repercussions" if a foreign bank were required to comply with our laws when engaging in commercial activities here. As the Securities and Exchange Commission pointed out to the court of appeals below,

Foreign banks that wish to sell their time deposits in this country without Securities Act registration may do so by issuing them in this country from domestic branches that are subject to federal bank regulation ... To permit foreign banks to compete with U. S. banks for deposits in this country without being subject to either federal banking or securities regulation would be contrary ... [to the International Banking Act] ...

Application of the registration provisions would not cause foreign banks to curtail their activities with U.S. residents ... Foreign banking institutions have filed registration statements with respect to their securities, including certificates of deposit, ... Foreign banks can take advantage of the Commission's Integrated Disclosure System for Foreign Private Issuers, which provides for short-form registration of foreign securities ... This short-form registration is similar to



that provided for domestic securities. In addition, foreign banks like Banamex can file a registration statement similar to the ones that U.S. bank holding companies file under Rule 415, 17 C.F.R. 230.415. This procedure would permit an issuer to file one registration statement for the entirety of its certificates of deposit which are issued at different times with varying interest rates and maturity lengths.

Brief of the Securities and Exchange Commission Amicus Curiae, pp. 11, 17.

The sovereign right of this Nation to enforce the laws of the land is certainly second to no imaginary risk of reprisal.

In Container Corporation of America v.

Franchise Tax Board, 51 L.W. 4987 (June 27, 1983), this Court stated,

The most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the nation as a whole ... In considering this issue, however, we are faced with a distinct problem. This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a



particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.

CONCLUSION

There is neither any issue of fraud or of damages before this Court, only the pure, simple, unfettered legal question of a security. It is ripe for and deserving of review now for all of the reasons stated, not the least of which is that for those countless thousands of "others similarly situated" (which Respondent's Brief in Opposition at page 27 acknowledges exist) there is no tomorrow; they have no other remedy; their claims will be decided by this case.

RESPECTFULLY SUBMITTED,

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